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# Executive Summary

This Report seeks to inform and support the Serbian authorities in the process of the implementation of the Media Strategy Action Plan of Serbia. It provides an overview of the key novelties of the Audiovisual Media Services Directive (hereinafter: AVMSD) with particular regard to the 2018 revision thereof (hereinafter: Revised AVMSD) in the following key policy areas:

1. The strengthening of the Country-of-Origin principle;
2. An extension of certain audiovisual rules to video-sharing platforms and social media services;
3. Protection of minors against harmful content online, including strengthening protections on video-on-demand services;
4. Reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences;
5. Increased obligations to promote European works for on-demand services,
6. New rules on advertising for linear audiovisual media service providers;
7. Strengthened provisions to protect children from inappropriate audiovisual commercial communications; and the
8. Independence of audiovisual regulators.

In each area – after an in-depth legal and policy analysis, academic literature review and the study of the most relevant country case studies – the Report concluded as follows:

1. The strengthening of the Country-of-Origin principle

The full transposition of the Revised AVMSD should be followed by Serbia, and Articles 45-46 of the Law on Electronic Media revisited and amended. In most cases, it is recommended to follow and transpose verbatim of the Revised AVMSD. Furthermore, it is recommended that Serbia considers the transposition specifics of Austria and Croatia in some particular aspects. It is to be noted that the future of the Country-of-Origin principle is contested in the digital, online, platformised media and communication environment.

## 2. An extension of certain audiovisual rules to video-sharing platforms and social media services

The expansion of the scope of the AVMSD to cover video-sharing platforms (VSPs) was arguably the most significant change in the 2018 revision. The Revised AVMSD focused on the protection of minors against harmful content online, combating hate speech and public provocation to commit terrorist offences on the internet. The amendments introduced a new statutory enforcement mechanism both at Member State (hereinafter: MS) and European Union (hereinafter: EU) levels. In Serbia, a minimum level of harmonisation is recommended – especially in light of the potential overlaps with the newly adopted Digital Services Act and the recently proposed draft European Media Freedom Act (hereinafter: Draft EMFA) - with a focus on raising standards for online harm reduction applicable to VSPs, addressing non-compliance, and increasing the transparency of VSP governance.

## 3. Protection of minors against harmful content online, including strengthening protections on video-on-demand services

The revised AVMSD has strengthened provisions on the protection of minors against harmful content and introduced, for the first time, the same requirements for linear and non-linear services. Harmful content is not prohibited under the revised AVMSD but it is subject to limitations – preventing minors from accessing and viewing such content. The media-specific regulation (i.e., the Law on Electronic Media and the Law on Advertising) in Serbia should be expanded to include VODs. The country analysis provides insight into a variety of measures that can help legislators in Serbia identify appropriate measures aligned with the AVMSD policy objectives and local context.

## 4. Reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences

The Revised AVMSD encompasses a broad range of delicate content regulation matters, aimed at combating racial, religious and other types of hatred by having reinforced rules to combat the incitement to violence or hatred, and public provocation to commit terrorist offences. The novelty of the Revised AVMSD was (1) the *precision of the definition and reference to the EU Fundamental Charter*; and (2) the *inclusion of public provocation to commit a terrorist offence under the scope of the provisions*. Based on the analyses of this Report, it is recommended that Serbian legislators should (a) revise the current Article 51 Prohibition of hate speech of the Law on Electronic Media and make explicit reference to Article 21 of the EU Charter of Fundamental Rights (minimum requirement); (b) make reference to and establish the obligation of the REM to exercise its control powers and take measures which are necessary and proportionate while enforcing hate speech relevant provisions of the Law, and respect the rights and principles established in the Charter of Fundamental Rights of the European Union; and (c) amend the Law on Electronic Media and insert a provision on the prohibition of public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU)

2017/541. Furthermore, it is recommended to consider a broader scope of the grounds of hatred to be included in the law. The Croatian example could serve as a good case for the Serbian legislators.

#### 5. Increased obligations to promote European works for on-demand services

For the first time, the revised AVMSD introduced promotional obligations for VODs whereas the legislative landscape for broadcasters remained the same. Member States now can require VODs: to include a mandatory minimum of 30% share of European works, alongside prominence requirements and to directly invest in cultural production and/or levies payable to a fund. The choice of financial contribution will also determine who controls the funding and what type of production is incentivized. Another novelty is that MSs can, under certain conditions, derogate from the country-of-origin principle and impose (only) financial contribution obligations to foreign VODs targeting audiences in another country. It is recommended to expand the scope of the Serbian Law on cinematography (or similar specific regulation) to include VODs. Quota and prominence obligations should be aligned with the revised AVMSD whereas the choice of type financial obligations should be decided upon detailed market analysis but should range between 1,4% to 5,15% of annual turnover – like in other MSs. Suppose the legislature in Serbia decides to impose measures on the foreign VODs (“targeting audience” in Serbia), they should also specify the “targeting” audience criteria, the type of investment imposed on foreign VODs and enforcement mechanisms.

#### 6. New rules on advertising for linear audiovisual media service providers

The revised AVMSD lays down two forms of advertising rules for linear (VODs and VSPs) and nonlinear media service providers, including a general obligation applicable to all media service providers. It also lowers the threshold for certain forms of commercial communication and in this way relaxes the overall regulatory framework. The principle of separation of audiovisual editorial and commercial content remains a building block and an essential safeguard of media pluralism and independence. The MSs mostly transposed provisions of the revised AVMSD verbatim. The transposition process in Serbia should conform to this trend and in addition – introduce measures to protect editorial independence and program integrity against undue influence and interference of marketing companies and state bodies – in line with the revised AVMSD, in particular Articles 9, 10, 11, 19, 20, bearing in mind the upcoming European Media Act Freedom that imposes rules on state advertising.

#### 7. Strengthened provisions to protect children from inappropriate audiovisual commercial communications

The revised AVMSD strengthens the provisions to protect children from inappropriate audiovisual commercial communications on unhealthy food and beverages and encourages Member States to

develop self and co-regulatory mechanisms and codes of conduct to effectively reduce children's exposure to advertising for these products. However, it does not explicitly prohibit advertising, but merely indicates that codes of conduct and multi-stakeholder agreements should seek to limit the exposure of children to unhealthy food advertisements. The country case analysis suggests that countries have transposed the relevant provisions verbatim, which is also a recommended plan of action for Serbia.

## 8. Independence of audiovisual regulators

Media regulators in Europe are key actors in safeguarding pluralism, and their independence is crucial in this role. However, there have been several cases in which these regulators were formally compliant with set legal requirements on independence, but in reality, acted very differently, and enforced typically political agendas, thus not serving the public at large. Within the previous European policy framework, there were no EU-level safeguards and no institutional mechanisms to ensure the independent operation of national regulators. This situation has changed since the Revised ASVMD introduced a *strict and detailed obligation for EU MSs* to designate one or more independent national regulatory authorities (NRAs) to oversee the broadcasting and audiovisual media sector within the respective national context. The(se) NRAs must be *legally distinct from the government* and *functionally independent* from their respective governments and any other public or private body (Article 30 AVMSD). The novelty of the Revised AVMSD concerning the independence of the national regulatory authorities is the *strictly codified requirements towards the national legislators to guarantee the NRA's formal (de iure) and functional independence*. These guarantees should include independence from the government and any other public or private body; financial independence; professional independence; and accountability of the NRA. The country case studies – Croatia, Slovenia and Spain - revealed several good legislative solutions with the utmost relevance to the Serbian transposition. Furthermore, the transposition of the new provisions of the Revised AVMSD should consider *previous evaluations about the level of independence of the Regulatory Authority for Electronic Media (REM)* which could greatly inform the next phase of the legislative process. Importantly, throughout the implementation of the Revised AVMSD newly adopted guarantees on functional independence of the REM should be complemented with adequate measures of accountability, introducing regular monitoring of REM's actions.

# Introduction and background

The Media Strategy Action Plan of Serbia was adopted in December 2020. It envisages a comprehensive set of measures that will contribute to the proper implementation of strategic goals, including amending media and media-related legislation. The current Action Plan covers the three years (2020 – 2022) of Media Strategy implementation and it envisages amendments to the 2014 Law on Electronic Media among other activities. Several delays in the legislative process occurred due to the Covid-19 outbreak, the snap 2022 elections and delays in establishing the Government after the 2022 elections.

However, during the analytical phase of the Media Strategy and the Action Plan drafting process, it was noted that audiovisual media content regulation needed urgent revisions, and capacity building was called for at the relevant institutions tasked with oversight and regulation of such content. This is why the Media Strategy enlisted as one of its priorities that “functional, competent, professional and open institutions have the mechanisms for protection against outside pressure and consistently apply public policies and regulations”.

Within its broader support to Serbian authorities to develop and implement the Media Strategy and legislation, this Report is to provide an overview of the key novelties of the Audiovisual Media Services Directive (hereinafter: AVMSD)<sup>1</sup> with particular regard to the 2018 revision thereof (hereinafter: Revised AVMSD)<sup>2</sup>, the policy objectives of the revisions and possibilities of transposing them into the Serbian legal system. The Report also includes relevant examples - in the form of case studies - from European Union (hereinafter: EU) Member States (hereinafter: MSs) and briefly describes, if applicable, provisions of other recent EU legislations that are significant to the Audiovisual Media Sector (hereinafter: AVMS). The guiding principle in referring to applicable (or non-applicable) case studies was the policy objective enshrined in the Stabilisation and Association Agreement on ‘Coopera-

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1 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version) (Text with EEA relevance) OJ L 95, 15.4.2010, p. 1–24.

2 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities PE/33/2018/REV/1 OJ L 303, 28.11.2018, p. 69–92.



tion in the audiovisual field<sup>3</sup>, namely that Serbia “shall align its policies on the regulation of content aspects of cross-border broadcasting with those of the EU and shall harmonise its legislation with the EU acquis. Serbia shall pay particular attention to matters relating to the acquisition of intellectual property rights for programmes and broadcast by satellite, cable and terrestrial frequencies”.

The objective of the Report is to inform the Serbian legislators, policy-makers and -stakeholders of available options for the implementation in the following key policy areas:

1. The strengthening of the Country-of-Origin principle;
2. An extension of certain audiovisual rules to video-sharing platforms and social media services;
3. Protection of minors against harmful content online, including strengthening protections on video-on-demand services;
4. Reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences;
5. Increased obligations to promote European works for on-demand services,
6. New rules on advertising for linear audiovisual media service providers;
7. Strengthened provisions to protect children from inappropriate audiovisual commercial communications; and the
8. Independence of audiovisual regulators.

In the following sections, the Report will briefly introduce the evolution of the AVMSD and the main policy objectives of the 2018 revision. Then, each policy area will be analysed in detail and the implementation experiences across EU MSs overviewed. Further, the Report will put forward recommendations towards the Serbian implementation procedures.

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3 “Stabilisation and Association Agreement - Article 104: Cooperation in the audiovisual field  
The Parties shall cooperate to promote the audiovisual industry in Europe and encourage co-production in the fields of cinema and television. Cooperation could include, inter alia, programmes and facilities for the training of journalists and other media professionals, as well as technical assistance to the media, the public and private, so as to reinforce their independence, professionalism and links with European media  
Serbia shall align its policies on the regulation of content aspects of cross-border broadcasting with those of the EC and shall harmonise its legislation with the EU acquis. Serbia shall pay particular attention to matters relating to the acquisition of intellectual property rights for programmes and broadcast by satellite, cable and terrestrial frequencies.”

# Methodology

The research and the analyses for this Report followed a mixed-method strategy, and a combination of legal and policy analyses. The study design enabled an inter-disciplinary approach to explore, analyse and assess, in line with the policy objectives, the most directly relevant aspects of AVMS development in Serbia from the perspectives of the Serbian policy-makers and -stakeholders to scrutinise the policy options and evaluate their adequacy. Thus, the Report considered the following:

## *I. Primary sources of law*

### a. EU statutory legal acts<sup>4</sup>

- AVMSD 2010: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version) (Text with EEA relevance) OJ L 95, 15.4.2010, p. 1–24.;
- AVMSD 2018: Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) given changing market realities PE/33/2018/REV/1 OJ L 303, 28.11.2018, p. 69–92.; and
- The consolidated version of the AVMSD 2010: Consolidated text: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) (Text with EEA relevance) Text with EEA relevance.

### b. EU policy documents

### c. Serbian statutory law:

- Law on Electronic Media (Official Gazette of RS, Nos 83/14 and 6/16 – other law);

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<sup>4</sup> For a complete listing of EU legislation relied upon in this Report, please see: References - Legislative texts.

- Law on Advertising (Official Gazette of RS, Nos 6/16 and 52/19 – other law)
  - Law on Cinematography (Official Gazette of RS, Nos 99/11 and 2/2012 and 46/2014 - decision of the Constitutional Court)
  - Law on Electronic Commerce (Official Gazette of RS, Nos 41/09, 95/2013 and 52/2019);
- d. Serbian policy documents
- The Strategy for the Development of Public Information System in the Republic of Serbia (Official Gazette of RS, Nos 48/18);
  - Action plan for the implementation of Strategy for the Development of Public Information System in the Republic of Serbia for the Period 2020-2025 (Official Gazette of the RS, No 11/20).

## II. Secondary sources

- a. EAO (2022). REVISED AVMSD TRACKING TABLE by the European Audiovisual Observatory; Last update: October 2022. Available at: <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>;
- b. Interactive searches across the national transpositions of the Audiovisual Media Services Directive. Available at: <https://avmsd.obs.coe.int/>;
- c. EPRS (2022). Transposition of the 2018 Audiovisual Media Services Directive - In-Depth Analyses by European Parliamentary Research Service; October 2022. Available at: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/730354/EPRS\\_IDA\(2022\)730354\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/730354/EPRS_IDA(2022)730354_EN.pdf).

Furthermore, state-of-the-art academic literature and policy scholarship were studied for in-depth analyses and reflection. The 2021 Special Issue of the *Journal of Digital Media & Policy*<sup>5</sup>, which was dedicated to the Revised AVMSD (and was co-edited by the author of this Report) was highly relevant to the individual policy issues and was included in the literature review. Also, the ‘Research Handbook on EU Media Law and Policy’ (Parcu and Brogi, 2021) greatly informed the analyses, while the monograph ‘European Audiovisual policy in transition’ (Ranaivoson, Broughton Micova and Raats, 2023a) provided great insights into MSs practices. Furthermore, in each instance, other, top-relevant literature was relied upon and referenced accordingly. Also, the author contacted several EU and other policy stakeholders - especially members and representatives of the European Platform for Regulatory Authorities (hereinafter: EPRA) - whose expertise and experiences were considered necessary and appropriate for the analyses. In the following, the Report summarises the key takeaways and puts forward recommendations.

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<sup>5</sup> Volume (12): Issue (3).

# Analysis of the 2018 revision of the AVMSD and Serbian Law on Electronic Media and the Law on Advertising (in part relevant to the 2018 AVMSD transposition)

The AVMSD, which was adopted in its current form in 2010, is the centrepiece of media policy in the European Union. It was classified as a law of minimum harmonization and aimed to create a common European production and distribution market by breaking down barriers to trade and establishing common standards. “However, because of the unique cultural and political function of audiovisual content, these common standards also contain positive content regulation to protect European content production from external competition, and sometimes the cross-border dissemination of audiovisual media content leads to conflicts among member states that test the fundamental principles of the Directive. The AVMSD is, therefore, a unique blend of the barrier-lifting liberal market approach typical of the EU’s single market and classic protectionism stemming from a history of concern that American content and media services would dominate European screens, threatening its cultures and industries.” (Broughton Micova, 2020): 264).

Over the multiple revisions in the last two decades, the AVMSD has been extended, first to on-demand audiovisual services and most recently to video-sharing platforms (VSPs) that disseminate user-generated content. This policy journey characterised the balancing of economic and cultural policy objectives through various policy innovations, and though “it has resulted in liberalization in MSs whose media markets suffered from oppressive and politically driven regulatory regimes, it has also taken a toll on smaller markets distressed by the major transnational audiovisual content providers better able to take advantage of the removal of barriers to dissemination.” (Rozgonyi and Broughton Micova, 2021): 337).

All in all, the AVMSD governs by today the EU-wide coordination of national legislation on all audiovisual media, including traditional TV broadcasts and on-demand services, but also VSPs. It is important to note, that the AVMSD does not apply to radio (only audio) type of services, however, several MSs have opted voluntarily to implement the same or similar normative standards to such programs.

Serbia has agreed to establish a regulatory framework “(...), particularly about the alignment with the EU acquis (first of all, with the Directive of Audio-Visual Media Services), and the shift from analogue to digital TV programme broadcasting by the deadlines specified in the international documents which are binding for the Republic of Serbia”.<sup>6</sup> Thus, it is of utmost importance to understand and evaluate the effectiveness of EU policy objectives for reasoned and sustainable implementation in Serbia.

## Overview of the 2018 revision of the AVMSD

The Revised AVMSD specifically aimed at (1) creating a level playing field for emerging audiovisual media and providing rules to shape technological developments; (2) preserving cultural diversity and investments in European content; (3) protecting users against hatred and children from online harms while regulating online platforms; and (4) safeguarding media pluralism and guaranteeing the independence of national media regulators. The Revised AVMSD opted for a broad range of legal constructs and policy instruments targeting the envisioned outcomes. The strengthening of the Country-of-Origin principle was encompassed with a reason of bringing more clarity on jurisdictional matters while regulating global digital services. On-demand audiovisual service providers were under renewed and more severe obligations on promoting European works within their catalogues and investing in such productions. The protection of minors against harmful content and inappropriate audiovisual commercial communications was reinforced through the extension of regulations to on-demand services, including VSPs. Moreover, VSPs need to take appropriate measures and ensure their users are protected against incitement to violence or hatred, and public provocation to commit terrorist offences. Last but not least, the independence of audiovisual media regulators in the MSs had to be guaranteed by more stringent legal mechanisms.

The deadline for the national transposition of the Revised AVMSD was 19 September 2020, but the vast majority of MSs were lagging with the process and it is still ongoing in some of them<sup>7</sup>. The most problematic MS with non-completed transposition was the Republic of Ireland, which is the Coun-

<sup>6</sup> Strategy for the Development of Public Information System in the Republic of Serbia, p. 2.

<sup>7</sup> See the tracking table of the Revised AVMSD; available at: <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>.

try-of-Origin for most of the VSPs rendered under regulation. The European Audiovisual Observatory (EAO) has launched a dedicated online database and tracking table<sup>8</sup> to show the actual state of play in each EU MS and the UK.<sup>9</sup> The legal texts listed in the table include final adopted laws and decrees, as well as draft proposals published as part of national consultations, presented or currently debated by the MSs' legislative bodies. In this Report, we will refer to the latest updates on implementation procedures reported in the EAO database and also use other triangulation methods for double-checking their status.

## 1. The strengthening of the Country-of-Origin principle

The Country-of-Origin principle has been one of the pivotal instruments establishing a European pro-competitive media order since 1989, incorporated in the main EU-specific legal document in the field of broadcasting, the Television Without Frontiers Directive. This principle ensured not only the free movement of trans-border television signals emerging and competing for European broadcast services but also a certain level of competition among national regulations and regulators. Moreover, it assured an ascendancy of democratic and socio-cultural objectives across Europe. The principle - as laid down in Art. 2(1) AVMSD - determines the regulatory approach towards both providers of linear and non-linear audiovisual media services by determining that a provider that falls under the jurisdiction of one EU Member State only has to ensure – in principle – that it is compliant with the legal framework of (only) that specific state and is then authorised by the rule set out by the AVMSD to disseminate its audiovisual media service content across all EU MSs.

The idea of having a free flow of information in which MSs ensure freedom of reception and do not restrict retransmission on their territory of the services originating in another MS as stipulated in Art. 3(1) depends on two factors: first, the jurisdiction needs to be determined based on the criteria of Art. 2(3) and (4). “It needs to be noted that from the outset the principle was not construed as being absolute but was made dependent on certain exceptional derogations and anti-circumvention measures which MSs could apply. This approach was retained throughout the revisions of the Directive in 1997, 2007 and 2018 with certain clarifications, partly codifying case law of the CJEU, concerning the question of jurisdiction being made. The idea of this approach is that MSs based on their responsibility for efficient enforcement of the applicable rules in exceptional cases need to be able to address threats to the fundamental rights of others and fundamental values posed by the

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<sup>8</sup> The database is available at: <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>.

<sup>9</sup> The UK has opted for implementing the Revised AVMSD despite of Brexit and leaving the EU.

cross-border dissemination of specific audiovisual content and that this has to be possible regardless of the otherwise applicable designation of the jurisdiction to the country of origin.” (Cole and Etteldorf, 2022): 13).

The Country-of-Origin principle is strongly related to the freedom of reception & retransmission of audiovisual media services. The fundamentals of broadcasting freedom were laid down by the Charter of Fundamental Rights of the EU, which provides in Article 11(1) that everyone has the right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Moreover, according to Article 11(2) of the Charter, the freedom and pluralism of the media shall be respected. Limitations to such rights and freedoms must be provided for by law and respect for the essence of those rights and freedoms in a proportionate manner, meeting the objectives of general interest (Article 52(1) of the Charter of Fundamental Rights).

## Analyses

The 2010 AVMSD provides for the freedom of reception and retransmission of audiovisual media services based on the principle of Country-of-Origin. *Within the EU*, MSs shall ensure freedom of reception and shall not restrict retransmission on their territory of audiovisual media services from other MSs for reasons which fall within the areas coordinated by the AVMSD (Article 3(1) AVMSD). Moreover, MSs may not restrict receipt of broadcasting or the retransmission thereof by non-EU (foreign) broadcasters if they comply with the AVMSD in the country where they originate. Derogation from the principle of freedom of reception and retransmissions is permissible under strict conditions (Article 3(2) AVMSD), including the manifest, serious and grave infringements on containing any incitement to hatred based on race, sex, religion or nationality (Article 6 AVMSD). Any restrictions must first be approved by the European Commission (EC) following an established procedure and are only allowed under exceptional circumstances:

- for linear audiovisual media services (TV broadcasts) (Article 3(2)-(3) AVMSD), there must be manifest and serious violations against human dignity (incitement to hatred) or children (e.g. pornography, gratuitous violence);
- for non-linear audiovisual media services (on-demand content) (Article 3(4)-(6) AVMSD), restrictions could also be justified where it constitutes a grave risk to other aspects of public policy, health or security, or consumers.

Restrictions must be proportionate and applied only in the country of reception, whereby the EU MS the programme originated from (the country of origin), should be notified in advance. The AVMSD

does not apply to audiovisual media services intended exclusively for reception in third countries and that are not received with standard consumer equipment directly or indirectly by the public in one or more EU MSs (Article 2(6) AVMSD).

The Revised AVMSD in 2018 strengthened the Country-of-Origin principle with the aim for more clarity on which MS's rules to apply, and aligned derogation procedures for TV broadcasters and on-demand service providers and possibilities for derogations in the event of public security concerns and serious risks to public health. During the revision process, several aspects of the applicability and the usefulness of the relevant rules were discussed and considerations were finally reflected in the amendments. On the one hand, the issue of how to draw a line between hate speech and propaganda, from the perspective of national security and public order raised concerns, while the absence of an urgency derogation mechanism for TV broadcasts, as opposed to the urgency procedure that was in place for on-demand services, had also been raised. Finally, the need for urgent regulatory interventions (within one month) was codified in the Revised AVMSD. The debates also touched upon the resilience of the Country-of-Origin principle. While reverting to regulation in the country of destination has never seriously been considered feasible, the 2018 amended procedure simplified the rules into one set for all services, also allowing for EU MSs to act only after one previous infringement, "essentially making it easier for members states to derogate from the Country-of-Origin principle" (Broughton Micova, 2020).

## A brief overview of the relevant articles of the Revised AVMSD

The new Article 2 (3) (b) is to clarify the decisive factors in establishing jurisdiction over media service providers. "The changes made both to Art. 3 and 4 were meant to streamline the procedures and thereby contribute to giving them the actual relevance that they were supposed to have from the outset in finding the right balance between the principal application of the Country-of-Origin principle and the need for Member States to defend fundamental interests when being confronted with situations in which content from audiovisual media services providers are endangering these." (Cole and Etteldorf, 2022): 19).

The essential jurisdictional links to a given MS are the following:

1. the MS, within which the head office is located;
2. the head office is located in a given MS but the editorial decisions are taken in another MS: the MS, within which the significant part of the workforce (editorial/programme production) is placed;



3. in case significant parts of the workforce are involved in multiple MSs: the MS, within which the head office is located;
4. in case no significant part of the workforce is involved in any MS: the MS, within which the media service provider first began its activity (provided that it maintains a stable and effective link with the economy of that MS).

The new Article 2 (5a) seeks to ensure that media service providers inform the competent national regulatory authorities or bodies about any changes that may affect the determination of jurisdiction, while the new Article 2 (5b) is to urge MSs to establish and maintain an up-to-date list of the media service providers under their jurisdiction and indicate on which of the criteria their jurisdiction was based. The national database will be available in a centralised database by the EC.

The new Article 2 (5c) is to provide a procedural framework for resolution and settlement in cases of conflicting jurisdictions. After consultations and the involvement of the European Regulators Group for Audiovisual Media Services (ERGA), the EC has to decide which MS has jurisdiction.

The new Article 3 (1-7) reiterates the freedom of reception and provides for certain derogations in the case a media service provider under the jurisdiction of another MS manifestly, seriously and gravely infringes the norms on

- incitement to violence or hatred,
- the public provocation to commit a terrorist offence, or
- may impair the physical, mental or moral development of minors

or prejudices or presents a serious and grave risk of prejudice to public health.

The new provisions set forth *a detailed procedural manner – including binding deadlines and strict procedural safeguards – for MSs and the conditions according to which MSs may adopt measures restricting the freedom of expression*. Importantly, Recital (9) affirms, that “the procedures and conditions for restricting the freedom to provide and receive audiovisual media services should be the same for both linear and non-linear services”.

*It is to be noted*, recently, these AVMSD rules on the freedom of reception and retransmission of audiovisual media services came into the spotlight regarding Russian language television channels

and related audiovisual media services<sup>10</sup>, especially in Latvia and Lithuania. During the course of the escalation of the conflict between Russia and Ukraine in 2014, the Latvian and Lithuanian national audiovisual regulators (NRAs) decided to suspend the rebroadcasting of certain Russian-language television channels in their respective countries. It was Lithuania and the RTR Planeta case (2015-2019), whereby the Lithuanian NRA, the Radio and Television Commission of Lithuania (RTCL) considered that the Russian language channel RTR Planeta, broadcasting to Lithuania from Sweden, had been broadcasting content that could be deemed as incitement to hatred. The language used during some programmes on RTR Planeta referred to military confrontations and contained unambiguous threats of occupation or destruction of countries, including the Baltic states. The RTCL, therefore, decided to suspend the retransmission of the channel. The EC confirmed the decision of the Lithuanian NRA.

Next, Latvia and the Rossija RTR case (2019-2021) highlighted the matter of derogations from the freedom of transmission. The Latvian NRA, the National Electronic Mass Media Council of Latvia (NEPLP) considered broadcasting content in Russian via satellite to Latvia from Sweden as incitement to violence or hatred, in particular, the language used during some programmes on Rossiya RTR contained references to military destruction and occupation and called for military actions against several countries, including among others Latvia and other Baltic states. NEPLP concluded, that the statements in the concerned programmes had the potential to create tensions and reactions of animosity within the population of Latvia and other countries, and therefore decided to suspend the retransmission of the channel. Under this decision, the retransmission of the television service Rossiya RTR by the Latvian cable operators was suspended.

The new Article 4 (1-7) is to ensure, that MSs are free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the AVMSD, provided that such rules comply with Union law. Moreover, the new provisions establish conflict resolution procedures amongst MSs in case of a media service provider under the jurisdiction of MS provides an audiovisual media service which is wholly or mostly directed towards the territory of another MS. In case of conflicts, the MS concerned may submit a substantiated request to the MS having jurisdiction and shall appeal to the media service provider to comply with the rules of general public interest in question. In such cases, the MS having jurisdiction shall regularly inform the requesting MS of the steps taken to address the problems identified. Also, the MS concerned may adopt appropriate measures against the media service provider concerned in case of proven and satisfactory evidence, that the provider has established itself in the MS having jurisdiction to circum-

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<sup>10</sup> See also the search results indicating 41 cases on the European Audiovisual Observatory's IRIS MERLIN database: [http://merlin-int.obs.coe.int/article\\_search?article\\_search%5Bsearch%5D=Russian+TV+channel&article\\_search%5BfromTs%5D=&article\\_search%5BtoTs%5D=&article\\_search%5BresultDisplay%5D=0](http://merlin-int.obs.coe.int/article_search?article_search%5Bsearch%5D=Russian+TV+channel&article_search%5BfromTs%5D=&article_search%5BtoTs%5D=&article_search%5BresultDisplay%5D=0).

vent the stricter rules. According to Recital (11), such evidence should detail a set of corroborating facts allowing for such circumvention to be reasonably established. The EC – with the involvement of ERGA – has the final say about the appropriateness of such measures.

## Country case analyses

The implementation of the Country-of-Origin principle and the new provisions of the Revised AVMSD did not indicate any country-specificities. Therefore, the selection of the country cases was based on the criteria of most-similar cases in terms of market size, geographical location (regional similarities), and the level of advanced jurisprudence. Thus, Austria (AT) was closely studied as a case of a well-developed legislative framework; Croatia (HR) because of regional and jurisdictional similarities, and the Netherlands (NL) showcased a well-established market of on-demand AV media services. The research utilised the database of [Interactive searches across the national transpositions of the Audiovisual Media Services Directive](#) (see Table 1: The strengthening of the Country-of-Origin principle - overview).

**Table 1: The strengthening of the Country-of-Origin principle - overview**

The strengthening of the Country-of-Origin principle		Comments
Policy objectives	<ol style="list-style-type: none"> <li>1. More clarity on jurisdiction;</li> <li>2. Aligned derogation procedures for AV linear service providers (TV broadcasters) and non-linear/on-demand service providers; and</li> <li>3. Possibilities for derogations in the event of public security concerns and serious risks to public health.</li> </ol>	New challenges due to jurisdictional issues vis-a-vis VSP providers.
Relevant Revised AVMSD provisions (numbering according to the Consolidated version of the AVMSD) - see for reference the Excel AVMSD Tracking Table	Article 2 (3) (b), (5a), (5b), (5c); Article 3 (1-7); Article 4 (1-7)	Enhanced role for <ul style="list-style-type: none"> <li>- the European Regulators Group for Audiovisual Media Services (ERGA),</li> <li>- the EC,</li> <li>- the Contact Committee in conflict-ing situations over jurisdiction.</li> </ul>
Relevant provisions of the Law on Electronic Media and/or the Law on Advertising	Article 45-46 Law on Electronic Media	Full transposition of the Revised AVMSD will be necessary upon the accession of the EU.

<b>The strengthening of the Country-of-Origin principle</b>		<b>Comments</b>
<p>Transposition of the 2018 revision of the AVMSD in selected EU Member States</p>	<p>Member State 1 – Austria (AT): in-depth analyses and relevance to Serbia</p> <p>Art. 2 (3)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 3. 2. to 6.: full transposition of the AVMSD (verbatim);</p> <p>Art. 2 (5a)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 10 7.: full transposition of the AVMSD and detailed obligations for AV service providers on reporting all details on ownership matters to the NRA (including shares of the media service provider are held, directly or indirectly, by corporations, partnerships or cooperatives, this must also be reported and their fiduciary relationships disclosed) and any subsequent change to the ownership or membership of the AV service provider which might alter the assessment of compliance within four weeks of the change becoming legally effective;</p> <p>Art. 2 (5b)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 3. 8.: NRA to maintain a list of media service providers established in Austria and publish it as appropriate (including the criteria for jurisdiction and competence), whereby the list must be updated at least once a year and has declaratory effect;</p> <p>Art. 2 (5c)                      [AT] Federal Act on the establishment of an Austrian Communication Authority (KommAustria Act, KOG) - consolidated 1st January 2021 - Art. § 39a.: obligation assigned to the NRA (KommAustria) to cooperate with ERGA and other MSs to determine jurisdiction over a provider or to determine whether there has been a circumvention of the rules on jurisdiction for legal supervision;</p> <p>Art. 3 (1)                      No article;</p>	

The strengthening of the Country-of-Origin principle	Comments
<p>Art. 3 (2)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 56. 1.: full transposition of the AVMSD (verbatim) and references to the relevant Austrian instances (e.g. Federal Chancellor);</p> <p>Art. 3 (3)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 56. 2. and 3.: full transposition of the AVMSD (verbatim);</p> <p>Art. 3 (4)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 63. and 64: very detailed procedural rules applicable in cases of repeated and grave violations of the law by the AV service provider, including public oral hearing by the NRA on the case, and other incremental sanctioning options;</p> <p>Art. 3 (5)                      No article;</p> <p>Art. 4 (2)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 60. 1.: full transposition of the AVMSD (verbatim);</p> <p>Art. 4 (3)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 60. 2. and 3.: full transposition of the AVMSD (verbatim) and also detailed procedural guarantees on the assessment of the intent of circumventing stricter or more detailed provisions of national law;</p> <p>Art. 4 (4)                      [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 60. 2. and 3.: full transposition of the AVMSD (verbatim);</p> <p>Art. 4 (6)                      [AT] Federal Act on the Austrian Broadcasting Corporation (ORF-G) - consolidated 1st January 2021 - Art. § 63, 64, 65: very detailed procedural norms on sanctions in cases of repeated and grave violations of the law by the media service provider (e.g. ex officio withdrawal of the license) and several guarantees on fair process;</p>	

The strengthening of the Country-of-Origin principle	Comments
<p>Member State 2 – Croatia (HR): in-depth analyses and relevance to Serbia</p> <p>Art. 2 (3)                      [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 7 (2) to (8): full transposition of the AVMSD (verbatim);</p> <p>Art. 2 (5a)                      [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 7 (13): obligation assigned to the NRA maintain a list of the media service providers under its jurisdiction and shall communicate it, including any updates thereto, to the European Commission;</p> <p>Art. 2 (5b)                      HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 7 (14): obligation assigned to the NRA maintain a list of the media service providers under its jurisdiction and shall communicate it, including any updates thereto, to the European Commission;</p> <p>Art. 2 (5c)                      [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 7 (15): if it cannot be established which State has jurisdiction, the NRA (Council) shall inform the European Commission without delay;</p> <p>Art. 3 (1)                      [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 10: reassurance of the freedom of transmission and reception of audio and audiovisual media services with reference to the AVMSD and the European Convention on Trans-frontier Television;</p> <p>Art. 3 (2)                      [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 91 (1) and (2): full transposition of the AVMSD (verbatim);</p> <p>Art. 3 (3)                      [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 91 (1),(3) and (4): full transposition of the AVMSD (verbatim);</p> <p>Art. 3 (4)                      No article;</p> <p>Art. 3 (5)                      [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 91 (5) and (6): in urgent cases, no later than one month, the NRA may derogate from the procedural obligations on measures applicable to the identification of jurisdiction and act upon infringements of the law;</p> <p>Art. 4 (2)                      No article;</p> <p>Art. 4 (3)                      No article;</p> <p>Art. 4 (4)                      No article;</p> <p>Art. 4 (6)                      [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 98 and 99: details on setting financial sanctions (penalties) against AV service providers (including precise categories of breaches of the law);</p>	

The strengthening of the Country-of-Origin principle	Comments
<p>Member State 3 – the Netherlands (NL): in-depth analyses and relevance to Serbia</p> <p>Art. 2 (3)                      [NL] Media Act 2008 - Consolidated - 1 July 2022 - Art. 1.2: full transposition of the AVMSD by reference to the relevant AVMSD articles + extension to radio services;</p> <p>Art. 2 (5a)                      [NL] Media Act 2008 - Consolidated - 1 July 2022 - Art. 3.29b: reporting obligation extended to on-demand AV service providers of any changes that may affect the jurisdiction of the Netherlands;</p> <p>Art. 2 (5b)                      [NL] Media Act 2008 - Consolidated - 1 July 2022 - Art. 7.22: obligation assigned to the NRA maintain a list of the media service providers under its jurisdiction;</p> <p>Art. 2 (5c)                      No article;</p> <p>Art. 3 (1)                      No article;</p> <p>Art. 3 (2)                      No article;</p> <p>Art. 3 (3)                      No article;</p> <p>Art. 3 (4)                      No article;</p> <p>Art. 3 (5)                      No article;</p> <p>Art. 4 (2)                      No article;</p> <p>Art. 4 (3)                      No article;</p> <p>Art. 4 (4)                      No article;</p> <p>Art. 4 (6)                      [NL] Media Act 2008 - Consolidated - 1 July 2022 - Art. 7.1 (3) and 7.11: stipulations for the responsibilities of the NRA on supervision of compliance.</p>	

<b>The strengthening of the Country-of-Origin principle</b>		<b>Comments</b>
Proposed regulatory interventions and implementation measures	<p>AT:</p> <ul style="list-style-type: none"> <li>- detailed reporting obligations on ownership transparency;</li> <li>- list of AV providers (criteria of jurisdiction and competence);</li> <li>- very detailed procedural rules applicable in cases of repeated and grave violations of the law by the AV service provider, including public oral hearing by the NRA on the case, and other incremental sanctioning options;</li> <li>- detailed procedural guarantees on the assessment of the intent of circumventing stricter or more detailed provisions of national law;</li> <li>- detailed procedural norms on sanctions in cases of repeated and grave violations of the law by the media service provider (e.g. ex officio withdrawal of the license) and several guarantees on fair process;</li> </ul> <p>HR:</p> <ul style="list-style-type: none"> <li>- details on setting financial sanctions (penalties) against AV service providers (including precise categories of breaches of the law).</li> </ul>	

## Conclusions and recommendations

The in-depth country case analyses (see Table 1: The strengthening of the Country-of-Origin principle - overview) revealed that the full transposition of the Revised AVMSD should be followed by Serbia, and the Articles 45-46 of the Law on Electronic Media revisited and amended. In most cases, it is recommended to follow and transpose verbatim of the Revised AVMSD.

Furthermore, it is recommended, that Serbia considers the transposition specifics of Austria (AT) at least in the following aspects:

- detailed reporting obligations on ownership transparency;
- list of AV providers (criteria of jurisdiction and competence);
- very detailed procedural rules applicable in cases of repeated and grave violations of the law by the AV service provider, including public oral hearing by the NRA on the case, and other incremental sanctioning options;
- detailed procedural guarantees on the assessment of the intent of circumventing stricter or more detailed provisions of national law;
- detailed procedural norms on sanctions in cases of repeated and grave violations of the law by the media service provider (e.g. ex officio withdrawal of the licence) and several guarantees on the fair process.



Importantly, up until Serbia has not been granted full membership of the EU, the implementation of the provisions on eventual extra-territorial jurisdiction of the NRA should be postponed. In those – very limited - cases of proven and satisfactory evidence, that the AV media service provider has established itself in another to circumvent the stricter rules applicable in Serbia, the NRA should not adopt any decisions with extra-territorial effect before the compliance mechanisms of the EC and the ERGA were established.

Also, it is recommended to consider the transposition in Croatia (HR) about the

- details of setting financial sanctions (penalties) against AV service providers (including precise categories of breaches of the law).

The [Interactive searches across the national transpositions of the Audiovisual Media Services Directive](#) database provide for the full-text provisions both in the national languages and also in English.

## Looking ahead

The future of the Country-of-Origin principle is contested in the digital, online, platformised media and communication environment. What has been a profound and decade-long well-functioning regulatory concept for television broadcast-type media services are facing the reality of VSPs' operations which are less concerned about local markets or country-specifics but smooth pan-European operations and centralised management, fiscal and regulatory functions.

The Revised AVMSD encompasses a broad range of delicate content regulation matters involving VSPs, including the protection of minors against harmful content and of users in general from incitement to violence or hatred. However, it is far from clear now how the combined application of these requirements and the Country-of-Origin principle would ensure that Europe's historical and cultural diversity, as embodied in national media laws and regulations, was duly respected and reflected in audiovisual media regulation vis-à-vis digital platforms (Rozgonyi, 2020).

Policy scholars, specialised in the field, have also observed, that the case of the AVMSD demonstrates „a split governance model between individual rights and public interests, which fails to protect adequately local cultural and social specificities in the media sphere” (Cavaliere, 2021): 407) and that the AVMSD does not fully address the role of algorithms in organizing content and the role of external stakeholders. It is possible that, in the years to come, some of the limitations of the current, fragmented regime will be overcome in different ways; for instance, by adopting a more content-neutral approach bringing all kinds of online media content under the same regulatory frame-

work, as recently recommended by ERGA.<sup>11</sup> Furthermore, the newly adopted Digital Services Act (DSA) of the EU<sup>12</sup> has introduced a new concept to applicable jurisdiction<sup>13</sup> and should be taken into account by the Serbian authorities.

## 2. The extension of certain audiovisual rules to video-sharing platforms and social media services

The expansion of the scope of the AVMSD to cover video-sharing platforms (VSPs) was arguably the most significant change in the 2018 revision. The Revised AVMSD extended the scope of audiovisual media regulation to VSPs - although VSPs do not have editorial responsibility for their content, which is user-generated - and to some extent to Social Media Service Providers (SMSPs)<sup>14</sup> (importantly: this regulation concerns only audiovisual content, and therefore, does not cover all content on social media platforms). The Revised AVMSD focused on the protection of minors against harmful content online, combating hate speech and public provocation to commit terrorist offences on the internet. The amendments introduced a new statutory enforcement mechanism both at MS and EU levels (Table 2) (see also in [\(Rozgonyi, 2020\)](#)). The approach of the new regulation was systemic rather than focusing on individual pieces of content on the platforms. It recognised the rights of the users, including explicitly mentioning the protection of freedom of expression [\(Kuklis, 2019\)](#); [\(Kukliš, 2021\)](#).

### Analyses

The scope of the amendments was set in the definition in Art. 1 (1) (aa), which introduced two crucial alternative criteria based on which the legal recognition of VSPs' depends: the provision of audiovisual content is either the principal purpose of the service or its essential functionality. The paragraph reads as follows:

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- 11 See the ERGA (European Regulators Group for Audiovisual Media Services) (2020), 'Position paper on the digital services act: Subgroup 1 – Enforcement', [https://erga-online.eu/wp-content/uploads/2020/06/ERGA\\_SG1\\_DSA\\_Position-Paper\\_adopted.pdf](https://erga-online.eu/wp-content/uploads/2020/06/ERGA_SG1_DSA_Position-Paper_adopted.pdf), p. 5.
  - 12 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)
  - 13 The DSA (Article 2 (1) stipulates, that "This Regulation shall apply to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of establishment."
  - 14 "...a social media service should be covered if the provision of programmes and user-generated videos constitutes an essential functionality of that service." Preamble (4) and (5) of the Revised AVMSD.

*‘video-sharing platform service’ means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing’.*

Thus, a VSP is a service devoted to the provision of programmes and user-generated videos for which its provider does not have editorial responsibility, but which the provider is organising – automatically or otherwise. “This disconnection between the provider and editorial responsibilities is a clear sign that with this type of service, we are not dealing with media in the traditional sense.” (Kukliš, 2020). The Revised AVMSD explicitly recognised this in its recital 48 (first sentence):

*‘In light of the nature of the providers’ involvement with the content provided on video-sharing platform services, the appropriate measures to protect minors and the general public should relate to the organisation of the content and not to the content as such.’*

This recital clarifies, that in contrast to traditional audiovisual media services, the newly protected areas (Art. 28b (1), (3)) were not aimed at the content itself, but only its distribution. Therefore, the Revised AVMSD represents a new approach to content regulation, which can be characterised as

- a systemic approach,
- under a minimum harmonisation regime,
- with distinct transparency rules, and
- the active user as a regulatory actor

(Kuklis, 2019), (Kukliš, 2021).

Meanwhile, the Revised AVMSD offers the possibility of regulating separate parts of the VSPs as on-demand audiovisual media services and provides for the interplay between two regulatory and liability regimes with some potential conflicts. According to Recital 3

*‘channels or any other audiovisual services under the editorial responsibility of a provider can constitute audiovisual media services in themselves, even if they are offered on a video-sharing platform.’*

Importantly, and due to different rules on jurisdiction matters for VSPs and on-demand services, the jurisdiction over channels on the VSPs (e.g., a YouTube channel), if considered an on-demand service, could lie with a different member state than the jurisdiction over VSP as such (Kukliš, 2020). In any case, the most relevant source for the implementation is the *‘Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’* issued by the European Commission<sup>15</sup>, which details and clarifies the criteria according to which VSPs services may be identified as subjects to regulation.

## **A brief overview of the relevant articles of the Revised AVMSD**

According to Article 28b (1) of the AVMSD Member States are required to hold VSPs responsible for ensuring any VSPs under their jurisdiction put in place appropriate measures to protect:

- minors from harmful content (which may impair their physical, mental or moral development), access to which shall be restricted;
- the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union;
- the general public from programmes, user-generated videos and audiovisual commercial communications containing content which is a criminal offence under European Union law (for example provocation to commit a terrorist offence or offences concerning child pornography).

Art 28b (3) (a) introduced the obligation for VSPs to include measures to protect users in the protected areas discussed above in their terms of service. Thus, it is primarily the VSP providers themselves who should implement the measures to achieve the objectives of the AVMSD, overseen by the national regulators. Meanwhile, Art. 28b (3) contains the set of measures vis-a-vis VSPs which need to be introduced in the national legislation (Broughton Micova&Kuklis, 2023):

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<sup>15</sup> COMMUNICATION FROM THE COMMISSION Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive (2020/C 223/02).

- (a) including and applying in the terms and conditions of the VSP services the requirements for protections;
- (b) including and applying in the terms and conditions of the VSP services the requirements for audiovisual commercial communications that are not managed by the VSP providers;
- (c) having functionality for users to indicate whether videos contain commercial communication;
- (d) establishing and operating transparent and user-friendly mechanisms for users of a VSP to report or flag to the VSP provider the content falling within one of the protected areas described in the previous section;
- (e) establishing and operating systems through which VSP providers explain to users what effect has been given to the reporting and flagging referred to in point (d);
- (f) establishing and operating age verification systems for users concerning content which may impair the development of minors;
- (g) establishing and operating easy-to-use systems allowing users to rate the content;
- (h) providing for parental control systems that are under the control of the end-user concerning content which may impair the development of minors;
- (i) establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider about the implementation of the measures referred to in points (d) to (h);
- (j) providing effective media literacy measures and tools and raising users' awareness of those measures and tools.

**Table 2: New rules applicable to VSPs and SMPs as enshrined in the Revised AVMSD**

Addressees of regulation	Video-sharing Service Providers - VSPs (Art. 1. (da)) and Social Media Service Providers SMSPs (Preamble 4, 5)
Objects of regulation	<ol style="list-style-type: none"> <li>1. incitement to hatred (Art. 28b (1) b and c);</li> <li>2. protection of minors (Art. 28b (1) a);</li> <li>3. public provocation to commit a terrorist offence (Art. 28b (1) c);</li> <li>4. non-appropriate audiovisual commercial communications (Art. 28b (2)).</li> </ol>

Regulatory requirements	<ul style="list-style-type: none"> <li>a. amendments to service terms and conditions with regard to 1-2-3 (Art. 28b (3 a));</li> <li>b. amendments to service terms and conditions with regard to 4 (Art. 28b (3 b));</li> <li>c. provision of user functionality with regard to 4 (Art. 28b (3 c));</li> <li>d. provision of user reporting and flagging with regard to 1-2-3 (Art. 28b (3 d)) as well as due explanation (Art. 28b (3 e));</li> <li>e. provision of age verification system to users with regard to 2 (Art. 28b (3 f));</li> <li>f. provision of a content rating system to users with regard to 1-2-3 (Art. 28b (3 g));</li> <li>g. provision of a parental control system to users with regard to 2 (Art. 28b (3 h));</li> <li>h. users' complaint handling and resolution with regard to a.-g. (Art. 28b (3 i));</li> <li>i. users' awareness-raising with regard to a.-h. (Art. 28b (3 j)).</li> </ul>
Regulatory process	<ul style="list-style-type: none"> <li>i. National level: statutory co-regulation with the involvement of the main stakeholders in the Member States and national regulatory authority or body - NRAs (Art. 4a (1)), based on national level Codes of Conduct (Art. 4a (1a));</li> <li>ii. EU level: self-regulation with the involvement of the main stakeholders at the Union level, based on EU-level Codes of Conduct (Art. 4a (2)).</li> </ul>
Regulatory supervision	<ul style="list-style-type: none"> <li>i. Up-to-date records of VSPs at the national level (Preamble 7);</li> <li>ii. Assessment of the appropriateness of measures 1-2-3-4 taken by VSPs by NRAs (Art. 28b (5)) based on the Country-of-Origin principle (Art. 28a (1-4));</li> <li>iii. Out-of-court redress mechanisms for settling disputes between users and VSPs (Art. 28b (7));</li> <li>iv. Court oversight of disputes between users and VSPs (Art. 28b (8)).</li> </ul>

The protection of minors, which is a traditional part of media content regulation, was also introduced about VSPs. The Revised AVMSD puts forward goals and principles towards the protection of minors which need to be met by the VSPs. However, Art. 28b (3), states that the most harmful content shall be subject to the strictest access control measures.

The protection against hate speech has been part of the audiovisual regulatory framework for a long time, and with the extension of the scope of the AVMSD, the VSPs now must implement it, too (see Art. 28b (3) in substance a), d) and partly h), and in support, e), i), j).

Criminal offences - which should be distinguished from hate speech - are a new area of regulation (see Art. 28b (3) a), d), e) and i).

Concerning audiovisual commercial communication, VSP's advertising is subject to the same basic requirements as commercial communication in general (see Art. 9 (1)). Meanwhile, in case of commercial communication that is not directly controlled by a VSP, they are obliged to take appropriate measures 'taking into account the limited control exercised by those video-sharing platforms over those audiovisual commercial communications' (see Art. 28b (3) a), b) and c).

It is also important to take note of the co-regulatory approach (Art. 28b) to VSP regulation introduced by the Revised AVMSD. “The multiple actors in the AVMSD’s co-regulatory systems can be loosely grouped into platforms, users, and regulators, creating a triangular governance framework in which rights and responsibilities are to be balanced.” (Kukliš, 2021).

## Implementation and enforcement: the assessment by independent regulators

Article 28b (5) requires to ‘*establish the necessary mechanisms to assess the appropriateness of the measures*’ vis-a-vis VSPs overseen and enforced by the NRAs. Importantly, this regulatory oversight should be “a systemic type of regulation, focused on procedures and processes. There is no expectation of focusing on individual items of content, only assessment of the measures VSPs are taking” (Kuklis, 2019). The possible regulatory approaches to the assessment of measures “spans from external monitoring complemented by VSPs’ self-reports to thorough external audits and investigations. The AVMSD does not set out investigatory powers for regulatory authorities or include transparency or access requirements on VSPs, so there is potential for great variation at the Member State level” (Ibid.).

However, because of the Country-of-Origin principle (see Chapter 1), not all NRAs will have jurisdiction over VSPs, but only those, where the VSPs are established according to the AVMSD. The applicable law to assess the appropriateness of the measures taken by VSPs and SMSPs will be that of the country of establishment, according to the Country-of-Origin principle (see <sup>Article 4a (3)</sup>). Since the major VSPs and SMSPs – including Facebook, YouTube and Twitter – were all incorporated in Ireland for their European operations, the Irish NRA will have to monitor compliance with the regulatory framework. Thus, the application of the Country-of-Origin principle has a paradoxical consequence in that the most nationally-sensitive speech matters will be (almost) exclusively dealt with by the Irish authorities (Rozgonyi, 2020), and defined purely according to Irish legal standards and sociocultural norms (Murphy, 2021). This said the ongoing transposition phase exposed the role of Ireland as the de facto regulator ‘for Europe’ concerning audiovisual media services disseminated across Europe by the VSPs.

Some Member States, such as France, criticised the inefficiency of the principle applied to online intermediaries and put forward proposals for overruling it and replacing it with the ‘destination-country’ principle, making VSPs responsible to the MS where breaches of rules and damage occurred. The preceding failures in applying the Country-of-Origin principle to non-compatible policy contexts should have alarmed EU policymakers about the consequences of such shortcomings. Scholars who revisited the principle also identified the most acute problems and developed pragmatic,



limited-potential solutions for such cases (Wagner, 2014). Yet, this aspect was not salient during the policy debates on the Revised AVMSD and only a few comments were made about changing the status quo (Murphy, 2021). Nevertheless, the introduction of VSPs into the scope of the AVMSD has profound implications for all EU NRAs who will need to be active and cooperate on an enhanced level (Rozgonyi, 2018). There has already emerged a formalised cooperation framework within the European Regulators Group for Audiovisual (ERGA), whose coordinating and advisory function was included in the Revised AVMSD.

Furthermore, VSPs and Member State governments will need to invest in digital literacy (see Art 28b(j)) the appropriateness of which will also be assessed by the NRAs. It is to be noted, that the Revised AVMSD provides for out-of-court redress mechanisms for the settlement of disputes (Art. 28b (7)), and this mechanism might also be subject to oversight by the NRA.

## Country case analyses

The newly introduced rules on VSPs are also subject to minimum harmonisation, which means that the AVMSD sets only basic standards that all member states have to implement into their legal frameworks, but Member States are not bound by the extent of the measures listed in Art. 28b (1) to (3) and can lay down ‘*more detailed or stricter*’ rules for the VSPs (within the limits of Art. 12 to 15 of the E-Commerce Directive and Article 25 of Directive 2011/93/EU). The implementation so far across the EU could be summarised as follows (see the European Parliament’s latest assessment (Cole and Etteldorf, 2022): 23):

- most Member States have closely followed the requirements of the AVMSD, partly integrating them into a framework of self-regulation and co-regulation to a differing extent but in which the NRAs have a decisive role with control and statutory powers; however
- there could be no conclusions drawn on the practical effects of the rules since the most important member state in this regard - Ireland - has not transposed the new rules yet, and the actual implementation is only to begin;
- in any case, it can already be stated with certainty, however, that cooperation mechanisms of the regulatory authorities will play a key role in the efficiency of the newly introduced obligations vis-a-vis VSPs, and the ERGA Memorandum of Understanding concluded in 2020<sup>16</sup> laid down the basic rules and procedures towards regulatory cooperation vis-a-vis VSPs.

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<sup>16</sup> See the MEMORANDUM OF UNDERSTANDING between THE NATIONAL REGULATORY AUTHORITY MEMBERS OF THE EUROPEAN REGULATORS GROUP FOR AUDIOVISUAL MEDIA SERVICES (2020), available at: [https://erga-online.eu/wp-content/uploads/2020/12/ERGA\\_Memorandum\\_of\\_Understanding\\_adopted\\_03-12-2020\\_1.pdf](https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_1.pdf).



As noted earlier, the implementation of the VSP-relevant rules was severely delayed in time across the EU, and on the national level we could observe main differences and country specifics (European Audiovisual Observatory, 2021). For this Report, the country case studies were selected as follows: the Republic of Ireland (IE), which will be the main country of origin for VSPs; Croatia (HR) because of regional and jurisdictional similarities; and the United Kingdom (UK), which country - despite of leaving the EU - has transposed the Revised AVMSD first and provided for a great level of transparency of the implementation. The research utilised the database of [Interactive searches across the national transpositions of the Audiovisual Media Services Directive](#) and the UK NRA (Ofcom) transparency reports (see Table 3: The extension of certain audiovisual rules to video-sharing platforms and social media services - overview).

**Table 3: The extension of certain audiovisual rules to video-sharing platforms and social media services - Overview**

The extension of certain audiovisual rules to video-sharing platforms and social media services - Overview		Comments
Policy objectives	To protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism (Recital 4, 45); Ensuring a level playing field (Recital 44)	New challenges due to jurisdictional issues vis-a-vis VSP providers.
Relevant Revised AVMSD provisions (numbering according to the Consolidated version of the AVMSD) - see for reference the Excel AVMSD Tracking Table	Art. 1 (1) (aa) Video-sharing platform service; Art. 1 (1) (da) Video-sharing platform provider; CHAPTER IXA PROVISIONS APPLICABLE TO VIDEO-SHARING PLATFORM SERVICES Article 28a; Article 28b;	Enhanced role for the European Regulators Group for Audiovisual Media Services (ERGA)
Relevant provisions of the Law on Electronic Media and/or the Law on Advertising	A completely new chapter to the Law on Electronic Media is to be drafted and added under the heading of 'Video-Sharing Platforms'. Moreover, the definitions of the Law on Electronic Media are to be amended by new definitions on <ul style="list-style-type: none"> <li>- Art. 1 (1) (aa) Video-sharing platform service; and</li> <li>- Art. 1 (1) (ba) User-generated video.</li> </ul> Furthermore, the Serbian legislation on Electronic Commerce needs to be reviewed and if necessary, changes adopted with a focus on matters of jurisdiction over VSPs and the establishment criteria defined by the implementation of Article 3(1) of the E-Commerce Directive.	Minimum harmonisation of the Revised AVMSD will be necessary upon the accession of the EU.

<p><b>The extension of certain audiovisual rules to video-sharing platforms and social media services - Overview</b></p>		<p><b>Comments</b></p>
<p>Transposition of the 2018 revision of the AVMSD in selected EU Member States</p>	<p>Member State 1 - Ireland (IE): in-depth analyses and relevance to Serbia</p> <p>Art. 1 (1) (aa) Video-sharing platform service                      [IE] Online Safety and Media Regulation Act                      Amendment of section 2 of Principal Act: verbatim with the AVMSD;</p> <p>Art. 28a (1), Art. 28a (2), Art. 28a (3), Art. 28a (4), Art. 28a (5)</p> <p>[IE] Online Safety and Media Regulation Act: The Principal Act is amended by the insertion of the following section after section 2A: jurisdiction and the establishment criteria defined by the implementation of Article 3(1) of the E-Commerce Directive; and the Media Commission within the Broadcasting Authority of Ireland shall designate which VSPs meet the jurisdiction criteria (139G (1)); additionally</p> <p>[IE] Online Safety and Media Regulation Act                      Amendment of section 2 of Principal Act 3. (1) (t):</p> <p>(a) a video-sharing platform service the provider of which is under the jurisdiction of the State, or</p> <p>(b) any other information society service, within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015—</p> <p>(i) the provider of which is under the jurisdiction of the State, and</p> <p>(ii) on which user-generated content is made available (directly or through providing access to another service),</p> <p>but does not include an audiovisual on-demand media service;”</p> <p>Art. 1 (1) (ba) User-generated video</p> <p>[IE] Online Safety and Media Regulation Act                      Amendment of section 2 of Principal Act 3. (1) (x): ‘user-generated content’, in relation to a relevant online service, means content created by a user of the service and uploaded to the service by that or another user;</p> <p>‘user-generated video’ means user-generated content consisting of a set of moving images with or without sound;</p> <p>Art. 28b (1), Art. 28b (2), Art. 28b (3)</p> <p>[IE] Online Safety and Media Regulation Act: newly added 139K (1)The Commission may make codes (‘online safety codes’), to be applied to designated online services to comply with the AVMSD criteria (cross-reference to the text of the AVMSD Article 28b(1)(a), (b) and (c)) - Application of online safety codes (139L about detailed implementation methods).</p>	<p>Although Ireland has just adopted the Online Safety and Media Regulation Act (Bill), which is the main legal act of the transposition, was <u>published in December 2022 and signed into law</u> by the President of the Republic of Ireland. Since Ireland will be the main EU MS to regulate VSPs, which are established in the country (including YouTube, Facebook and other major VSPs), it is of utmost relevance to study the newly adopted legislation for the comparative purposes of this Report.</p>

The extension of certain audiovisual rules to video-sharing platforms and social media services - Overview	Comments
<p>Member State 2 - Croatia (HR): in-depth analyses and relevance to Serbia</p> <p>Art. 1 (1) (da) Video-sharing platform provider [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 3 (1) 29. : verbatim that of the AVMSD;</p> <p>Art. 28a (1) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 95 (1) Jurisdiction over VSPs according to AVMSD rules;</p> <p>Art. 28a (2) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 95 (2) and 3 (1) point 8. to 10. : verbatim that of the AVMSD;</p> <p>Art. 28a (3) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 95 (3): verbatim that of the AVMSD;</p> <p>Art. 28a (4) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 95 (4): verbatim that of the AVMSD;</p> <p>Art. 28a (5) [HR] Zakon o Elektroničkoj trgovini - pročišćeni 29. ožujka 2019 - Art. 1 (1), 1a, 3, 5a, 16 to 18 and 20, 21: detailed implementation in the Electronic Commerce Act reassuring its applicability to VSPs;</p> <p>Art. 28a (6) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 95 (5) and (6): verbatim that of the AVMSD;</p> <p>Art. 28b (1) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 96 (1): verbatim that of the AVMSD adapted to the Croatian legal context, making references to the Criminal Code of Croatia;</p> <p>Art. 28b (2) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 96 (2) to (5) : verbatim that of the AVMSD;</p> <p>Art. 28b (3) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 96 (6) to (8) : verbatim that of the AVMSD;</p> <p>Art. 28b (4) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 96 (9): verbatim that of the AVMSD;</p> <p>Art. 28b (5) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 96 (10): verbatim that of the AVMSD;</p> <p>Art. 28b (10) [HR] Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 96 (9): entitling the Council to encourage the code of conduct.</p>	<p>Croatia has implemented the relevant AVMSD rules by close to an identical transposition of the text of the AVMSD in the Electronic Media Act, and making the necessary references to national law (e.g. Criminal Code). However, some provisions were enacted in the Electronic Commerce Act reassuring its applicability to VSPs.</p>

<p><b>The extension of certain audiovisual rules to video-sharing platforms and social media services - Overview</b></p>	<p><b>Comments</b></p>
<p>(former) Member State 3 - United Kingdom (UK): in-depth analyses and relevance to Serbia</p> <p>The statutory requirements for VSP providers come into force on 1 November 2020. It is for VSP providers to assess whether a service falls under the scope of the regulation and therefore needs to comply with the new requirements. VSP providers were required</p> <ul style="list-style-type: none"> <li>- to notify the UK NRA (Ofcom) whether they fell within scope of the regulation;</li> <li>- to take appropriate measures to protect children (under 18) from content which might impair their physical, mental or moral development;</li> <li>- to take appropriate measures to protect the general public from content inciting violence or hatred, and content constituting criminal offences relating to terrorism; child sexual exploitation and abuse; and racism and xenophobia.</li> </ul> <p>Definition of VSP: service, or a dissociable section of a service, is a VSP if the service, or the dissociable section, meets the conditions listed below and either of the following apply:</p> <ul style="list-style-type: none"> <li>a) the provision of videos to members of the public is the principal purpose of the service or of the dissociable section of the service; or</li> <li>b) the provision of videos to members of the public is an essential functionality of the service (as a whole).</li> </ul> <p>Additional conditions that must be met in relation to the service or dissociable section of the service are:</p> <ul style="list-style-type: none"> <li>a) it is provided by means of an electronic communications network;</li> <li>b) it is provided on a commercial basis;</li> <li>c) the person providing it does not have general control over what videos are available on it, but does have general control over the manner in which videos are organised on it (which includes being organised automatically or by way of algorithms, in particular by displaying, tagging and sequencing); and</li> <li>d) that person is under the jurisdiction of the United Kingdom.</li> </ul> <p>Jurisdiction: a VSP is under UK jurisdiction for the purposes of AVMSD if it is established within the UK under the eCommerce Directive (VSPs falling under UK jurisdiction are to be found <a href="#">here</a>).</p>	<p>The UK's approach to VSP regulation</p> <ol style="list-style-type: none"> <li>1. Ofcom was one of the first regulators in Europe to implement and deliver a fully operational VSP Regime;</li> <li>2. Ofcom expected VSP providers to begin by prioritising compliance measures which were likely be most effective at protecting users from harmful material, such as updating and enforcing terms and conditions which reflect the areas of harm in the AVMSD, and ensuring children were not able to access restricted material; furthermore</li> <li>3. VSP providers were expected to regularly review the effectiveness of any measures they have implemented and update these accordingly;</li> <li>4. <u>Collaboration with industry</u> and other relevant stakeholders during the initial period of implementation was critical;</li> <li>5. <u>Ofcom's role</u> was not focussed on determining whether particular items of content should or should not be made available or whether they comply with specific content standards, but rather <u>to ensure VSPs have had safety systems and processes in place</u> that provide effective protection to their users from harms.</li> </ol>

The extension of certain audiovisual rules to video-sharing platforms and social media services - Overview		Comments
<p>Proposed regulatory interventions and implementation measures</p>	<ol style="list-style-type: none"> <li>1. There is a clear inclination towards minimum level of harmonisation, which is also the recommended path of action for Serbia.</li> <li>2. A completely new chapter to the Law on Electronic Media is to be drafted and added under the heading of 'Video-Sharing Platforms'. Moreover, the definitions of the Law on Electronic Media are to be amended by new definitions on             <ul style="list-style-type: none"> <li>- Art. 1 (1) (aa) Video-sharing platform service; and</li> <li>- Art. 1 (1) (ba) User-generated video.</li> </ul> </li> <li>3. Furthermore, the Serbian legislation on Electronic Commerce needs to be reviewed and if necessary, changes adopted with a focus on matters of jurisdiction over VSPs and the establishment criteria defined by the implementation of Article 3(1) of the E-Commerce Directive. In this regard, the Croatian example could be a useful one to be followed.</li> <li>4. The Regulatory Body for Electronic Media (REM) will have to play a central role in the implementation of the new norms on VSP regulation.</li> <li>5. The minimum and maximum policy objectives of the implementation should             <ul style="list-style-type: none"> <li>- raise standards on harm reduction for VSPs,</li> <li>- address non-compliance, and</li> <li>- increase the transparency of VSP governance.</li> </ul> </li> </ol>	<p>The onus should be on VSP providers to determine how best to manage the risks their services pose and to take action that is proportionate to the risk of harm and tailored to the circumstances they face. Policy priorities should include:</p> <ul style="list-style-type: none"> <li>- Reducing the risk of dissemination of child sexual abuse material (CSAM);</li> <li>- Tackling hate and terror effectively protect users from terrorist content, racism and xenophobia, and material likely to incite violence or hatred;</li> <li>- Protections for under 18s and age verification on adult VSPs;</li> <li>- Reporting and flagging: to ensure that VSPs' flagging and reporting processes are effective and that VSPs increase user engagement with those measures i.e. actively using the reporting functionalities.</li> </ul>

## Conclusions and recommendations

The comparative analyses of the country's case studies revealed a scattered picture of the implementation experiences so far. Since Ireland has just adopted (on the 10th of December 2022) the relevant laws transposing the Revised AVMSD, there was no empirical evidence on the effectiveness of the implementation and we could only analyse the text of the Online Safety and Media Regulation Act (Bill). The Bill has a much wider scope than the regulation of content available on relevant online services and harmful online content available on designated online services, and it aimed to revise the complete area of AV regulation in Ireland. One of the most significant changes the Bill has brought about was the establishment of the new national regulator, the Coimisiún na Meán - by the dissolution of the Broadcasting Authority of Ireland and the transfer of its functions to Coimisiún na Meán - with responsibility for the entire AV media sector. Importantly, the Bill has assigned the tasks of VSP regulation to the Commission with full responsibility for implementation. In most parts, the Bill has closely followed the wording of the Revised AVMSD for the transposition. The most relevant sections of the Bill were analysed in detail (see Table 3).

Meanwhile, Croatia has proposed draft amendments to the Law on Electronic Media (ZEM) already in 2020 and adopted on 1st October 2021. The Croatian transposition closely followed the wording of the Revised AVMSD, and only in a few cases (e.g., jurisdictional matters) has involved other legislations, such as the Electronic Commerce Act of Croatia, to reassure its applicability to VSPs<sup>17</sup>. The competent regulatory body is the Electronic Media Council (CEM) which manages the Agency for Electronic Media (AEM) which carries out the duties of a regulatory body in the area of electronic media. However, the Croatian implementation experience was also very limited. Because of the Country-of-Origin principle, Croatia had no de facto jurisdiction over VSP providers, and the CEM and the AEM could not in practice exercise their newly gained regulatory powers so far.

Therefore, our focus was on the UK implementation processes, and we could locate several meaningful and informative insights about the practicalities of regulating VSPs. The UK regulator, Ofcom acted with full transparency about its approach to VSP regulation and the steps taken. In Table 3 all relevant regulatory documents (reports, policy briefs) were referenced and the source of information was indicated. In sum, we have considered the following recommendations for the Serbian transposition process:

1. There is a clear inclination towards a minimum level of harmonisation, which is also the recommended path of action for Serbia.

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<sup>17</sup> Primary legislation: the new Electronic Media Act (Nacrt Zakona o elektroničkim medijima) and the Electronic Commerce Act (Zakon o elektroničkoj trgovini).

2. A completely new chapter to the Law on Electronic Media is to be drafted and added under the heading of ‘Video-Sharing Platforms’. Moreover, the definitions of the Law on Electronic Media are to be amended by new definitions on
  - Art. 1 (1) (aa) Video-sharing platform service; and
  - Art. 1 (1) (ba) User-generated video.
3. Furthermore, the Serbian legislation on Electronic Commerce needs to be reviewed and if necessary, changes adopted with a focus on matters of jurisdiction over VSPs and the establishment criteria defined by the implementation of Article 3(1) of the E-Commerce Directive. In this regard, the Croatian example could be a useful one to be followed.
4. The Regulatory Body for Electronic Media (REM) will have to play a central role in the implementation of the new norms on VSP regulation. However, the REM will have to closely cooperate within the ERGA - and possibly within the EPRA - networks in implementing the new rules vis-a-vis VSPs ([Rozgonyi, 2018](#)). Importantly, it is highly recommended that the REM conducts a feasibility study about the possibilities of regulating VSPs, especially in light of the consequences of the application of the Country-of-Origin principle.
5. The minimum and maximum policy objectives of the transposition and the implementation should focus on
  - raising standards for harm reduction applicable to VSPs,
  - addressing non-compliance, and
  - increasing the transparency of VSP governance.

## Looking ahead: new legislations emerging in the EU at the crossroads of VSP regulations

There are several emerging and to some extent concurring legislations and legislative proposals in the EU that we need to consider while elaborating on the optimal transposition strategy of the Revised AVMSD.

First, there are several concerns about the lack of clarity in the relationship between the DSA and the AVMSD, despite the clear statement in the DSA about its horizontal nature and that it is “without prejudice” to more specific legislation, including the AVMSD (DSA, 2022; Art.1a). There are overlaps in the services in the scope of the two pieces of EU law, whereby the DSA will apply to all digital services that can be defined as intermediary services, including VSPs, and includes the catego-



ries of very large online platforms (VLOPs) and very large online search engines (VLOSE), which are subject to greater obligations. “Several examples can illustrate this: According to Art. 26(2) DSA, an online platform (which could be a VSP) is obliged to provide users with a function with which they can declare whether the content they upload constitutes or contains commercial communications, while Art. 28b(3) AVMSD obliges Member States to ensure that VSPs comply with the rules on commercial communication of the AVMSD (Art. 9), stating that measures shall consist (inter alia) of “having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know”. This means that AVMSD and DSA apply in parallel to the same situations, except that the DSA is stricter and, as a Regulation, directly binding, whereas the AVMSD leaves the Member States room for manoeuvre.” (Cole and Etteldorf, 2022): 42). The complex task of ‘separating’ the subjects of regulation and also the setting of tailored measures will be the most challenging phase of the upcoming period of implementation. Thus, it is recommended for Serbia closely monitor and follow the emerging policy discourses with the EU and draw the necessary consequences to the national procedures.

Furthermore, there are also explicit overlaps with the recently adopted Digital Markets Act<sup>18</sup> (DMA). The DMA directly addresses providers falling under the AVMSD scope by referring to “video-sharing platform services within the meaning of Article 1(1)(aa) of Directive 2010/13/EU” (Art. 2 para. 8 DMA) and “also actors in the audiovisual distribution and value chain such as online search engines (relevant for the findability of audiovisual content), online social networking services (relevant for the distribution of audiovisual content), virtual assistants (relevant for the navigation towards audiovisual content) and online advertising services (relevant for the financing of audiovisual content) as long as they are provided by gatekeepers which the European Commission will designate based on certain criteria of market dominance” (Cole and Etteldorf, 2022): 44).

Similarly, the recently proposed legislation in the EU, the draft European Media Freedom Act (EMFA)<sup>19</sup> has put forward meaningful requirements for the enforcement of obligations by video-sharing platforms. Article 14 of the EMFA proposed to set clear and detailed rules - directly applicable to all EU MSs - on the procedures of how any national regulatory authority or body may request another national regulatory authority or body to take necessary and proportionate actions for the effective enforcement of the obligations imposed on video-sharing platforms under Article 28b of Directive

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18 REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

19 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU; COM/2022/457 final.



2010/13/EU.<sup>20</sup> Therefore, it is highly recommended that the Serbian transposition takes into utmost consideration the proposed rules on regulatory cooperation while addressing the role of the REM in implementing the new VSP-related regulatory regime.

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<sup>20</sup> Article 14 EMFA - Requests for enforcement of obligations by video-sharing platforms

1. Without prejudice to Article 3 of Directive 2000/31/EC, a national regulatory authority or body may request another national regulatory authority or body to take necessary and proportionate actions for the effective enforcement of the obligations imposed on video-sharing platforms under Article 28b of Directive 2010/13/EU.
2. The requested national authority or body shall, without undue delay and within 30 calendar days, inform the requesting national authority or body about the actions taken or planned pursuant to paragraph 1.
3. In the event of a disagreement between the requesting national authority or body and the requested authority or body regarding actions taken pursuant to paragraph 1, either authority or body may refer the matter to the Board for mediation in view of finding an amicable solution.
4. If no amicable solution has been found following mediation by the Board, the requesting national authority or body or requested national authority or body may request the Board to issue an opinion on the matter. In its opinion, the Board shall assess whether the requested authority or body has complied with a request referred to in paragraph 1. If the Board considers that the requested authority has not complied with such a request, the Board shall recommend actions to comply with the request. The Board shall issue its opinion, in agreement with the Commission, without undue delay.
5. The requested national authority or body shall, without undue delay and within 30 calendar days at the latest from the receipt of the opinion referred to in paragraph 4, inform the Board, the Commission and the requesting authority or body of the actions taken or planned in relation to the opinion.

### 3. Protection of minors against harmful content online, including strengthening protections on video-on-demand services

The EU policymakers have for a long time sought to strike a balance between different fundamental rights, most notably the rights to freedom of expression and appropriate regulatory instruments to protect minors from harmful content in the mediatized environment (European Audiovisual Observatory 2015:18, see also Recital 4). Protection of minors against harmful content has become an important component of media regulation at the EU level, and the revised AVMSD has further strengthened the EU competencies and agenda in this domain by laying down a new set of rules to tackle off- and online harmful content. However, as the secondary level legislation, the AVMSD needs to be viewed through a spectre of primary regulatory instruments such as the Treaty on the European Union (TEU) and the Charter of Fundamental Rights of the European Union (CFREU), other secondary-level legislation such as data protection framework, regulation of intermediaries (DSA) and media freedom (EMFA), but also co-regulatory mechanisms such as the Code of conduct on countering illegal hate speech online (European Commission, 2016b) whose parties are tech-companies and large VSP service providers, European institutions and other relevant actors from the field. All of these regulatory axes, to some extent, address the issues about the protection of minors against harmful content, thus provisions enshrined in these policies are relevant for interpreting the scope of the protection of minors in the Revised AVMSD.

According to some authors, the Revised AVMSD has a pivotal role in online hate regulation of content on VSP services (Barker, 2021:387). Other regulations tackling a similar set of issues are recent and in fact, the audiovisual media regulation has encompassed the provisions for the protection of minors long before the DSA and the EMFA were proposed. Thus, the Revised AVMSD continues to address this matter and in addition, recognizes increased reliance on and relevance of VSPs services as well as the safety threats posed to minors (Recital 45). It introduces the same requirements for linear and non-linear services, leaving it up to MSs to impose a *“higher degree of protection for the content which may impair the physical, mental or moral development of minors”* (Recital 20).

## Analysis

The Revised AVMSD does not define harmful content nor it refers to any particular forms of content that could be qualified as such<sup>21</sup>. In several recitals, such as Recital 19, and similarly Recital 45 that mentions harmful content and hate speech in the context of VSP services, the AVMSD requires service providers to empower users by providing additional information about content that may affect minors' physical, mental or moral development. Similarly, Recital 20 specifies that the most harmful content, which *“may impair the physical, mental or moral development of minors, but is not necessarily a criminal offence, should be subject to the strictest measures.”* This lack of explanation of 'harmful content' and indicators for assessing the harms to physical, mental and moral development should not be a surprise as MSs have a long tradition of regulating different forms of harmful content and, thus they should delineate harmful from the permitted speech in line with their policy and societal objectives. As noted in this Report, as a minimum harmonisation instrument, the transposition of AVMSD often results in divergent interpretations of these concepts and that is particularly concerning in the case of VSP services due to their cross-border and transglobal provision of services.

The Revised AVMSD introduced the same set of requirements for the protection of minors against harmful content applicable to programmes, content, user-generated videos and audiovisual commercial communication, stating that *“the appropriate measures for the protection of minors applicable to **television broadcasting services should also apply to on-demand audiovisual media services**”* (Recital 20, emphasis added). Article 6a specifies these measures applicable to all media service providers under the jurisdiction of the Member State. They should ensure that content that may impair the physical, mental or moral development of minors is *“only made available in such a way as to ensure that minors will not normally hear or see them”* (para.1). For broadcasters, these measures may include different broadcasting time, age verification and other technical tools, but *“the most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures”* (para.1). Another preventive measure ensures that minors and parents have sufficient information about harmful content, thus requiring from media services to *“use a system describing the potentially harmful nature of the content of an audiovisual media service”* (para.3). This can be done, for example, *through a system of content descriptors, an acoustic warning, a visual symbol or any other means, describing the nature of the content* (Recital 19).

The criteria for deciding whether the program can impair the well-being of the minors (in the previous 2013 revision the term 'seriously impairing' was mentioned, Article 27(1)) is left within the margin of interpretation of MSs (Recital 20). Programmes or content that can impair the well-be-

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21 The EU Charter on fundamental rights defines hate speech as incitement to violence or hatred directed at a group (member) on the grounds listed in Article 21 of the Charter (e.g., sex, race, political opinion).

ing of minors is not, under Article 6a, prohibited (the 2013 AVMSD prohibited these kinds of programmes for broadcasters, Article 27 (1)) – it is allowed under the condition that minors will not normally be able to hear or see them. Similarly, the most harmful content such as gratuitous violence and pornography is allowed under the condition that media services use *the strictest* measures to prevent minors from viewing and accessing such programmes or content. The Revised AMVSD does not define ‘gratuitous violence’ (except in Recital 20 stating that this content should not constitute a criminal offence) and the listed protection measures, under Article 6a, are of the general nature (e.g., age verification system and for the most harmful content encryption and effective parental controls, Recital 20), thus leaving to the MSs to define specific measures and impose stricter rules for different forms of harmful content. Interestingly, the AVMSD is also silent about the protection of minors in gambling promotion. Recital 30 mentions the relevance of effective protection from the exposure of minors to media and commercial gambling content and recognizes the existence of self- and co-regulatory systems at the EU level for the promotion of responsible gambling, but does not go further to impose specific measures and restrictions on the promotion of gambling (European Audiovisual Observatory, 2022: 38).

A legislative decision to capture VSPs services – and social media platforms – under the audiovisual media services regulation indicates that “the EU has made a strategic announcement of its intent to tackle online hate speech across a multitude of platforms and forms” (Barker, 2021:389). A legal reasoning behind this decision can be found in Recital 47 which stipulates that even without significant editorial control over the content that is shared on their platforms, “*those providers typically determine the organisation of the content, namely programmes, user-generated videos and audiovisual commercial communications, including by automatic means or algorithms*”. Due to the increased use of VSPs services by minors and the spread of harmful and hateful content on their channels (Recital 47), MSs need to ensure that VSP providers established under their jurisdiction use appropriate measures concerning the content, user-generated content and commercial communications to protect minors from content that may impair their physical, mental and moral development as well as the general public from content containing incitement to violence and hatred towards a person or groups, including content that constitutes a criminal offence under EU law (public provocation to commit a terrorist offence, offences concerning child pornography and offences concerning racism and xenophobia) (Article 28b (1), discussed extensively in this report, see chapter: New rules on advertising for linear service providers).

More specifically, Article 28b (3) introduces a set of measures that VSPs can impose to prevent the spread of harmful content and enable effective content moderation, including removal. Those measures include, for example, the inclusion and application of terms and services that specify adopted requirements, (a), user-friendly reporting mechanisms to report and flag content that may be harm-

ful to minors (d), including explanatory videos about the functionality and effects of reporting mechanisms (e) as well as establishing and operating age verification system (f) or an easy-to-use system allowing content rating for the harmful content (g), including parental control systems that are under the control of the user (h). The proposed measures indicate a shared responsibility of users, state authorities and VSPs that are now all involved in handling harmful and other forms of illegal content. The proposed measures also rely on the relationship VSPs have with their users but also require the usage of automated systems and human moderation to detect and filter the most harmful content (European Commission, 2020: 63).

It should be recalled that these new requirements imposed on VSP services fall within the regulatory power of the MSs and are subject to the country-of-origin principle. In other words, these new obligations will be only applicable to VSP services where they are established. They have already raised significant concerns as the proposed measures are seemingly shifting the responsibility for control over harmful content from state authorities to private companies. In this relationship, the MSs will keep an oversight role in assessing the compliance of the media service providers, and especially VSPs with the proposed measures (Barker, 2021: 390). However, some authors claim this “significant shift in the new rules means that users for the first time have ‘real’, enforceable rights” (Kuklis, 2018). Another point of concern was tied to a persistent problem of delineation of harmful content from permitted content. In the context of VSP services that rely on automated systems to remove harmful content, this increases the risk of over-removal, including the removal of permitted speech. The Revised AVMSD remained silent and does not include indicators for delineation (as these fall within the remits of MSs), thus VSPs are, seemingly, tasked to determine the parameters of expression (Barker, 2021: 392), including concerning the content that may impair the well-being of minors and other harmful content. All of these points of concern are, to some extent, connected to the problem of scale, velocity and volume as hundreds of thousands of videos are uploaded on YouTube, and other VSP services, many of which contain harmful content (Barker, 2021: 391). These concerns are – in part – “some of the ambition behind the revised AVMSD provisions” (ibid.). For this reason, the AVMSD provisions concerning VSP services are seemingly going to transform the governance regimes of online speech (Rozgonyi, 2020: 92).

Finally, there is a tendency to assess ‘the successes’ of measures in reducing harmful content by increasing the number of takedowns of content, while there is no clear causal relationship and evidence that more takedowns will decrease harmful content online and societal tensions. However, “such measures of success are of little surprise given the ‘industrial’ rather than cultural approach to policy that has historically underpinned the origins of the AVMSD” (Broughton Micova, 2021: 2). In other words, “celebrating takedowns is not a measure of success but rather a marker of the scale of the speech problem” (Barker, 2021: 392). Against all pitfalls and pearls, the AVMSD made an important and long-awaited step in regulating and extending requirements in the direction of vid-

eo-streaming, on-demand services, and social media platforms, including user-generated content and commercial communication.

## A brief overview of the relevant articles of the Revised AVMSD

The Revised AVMSD does not implicitly prohibit certain types of content that can impair the physical, mental and moral development of minors nor the most harmful content such as serious gratuitous and pornography. “What constitutes hate speech or what kind of content is considered to harm the physical, mental or moral development of a minor can vary across jurisdictions” (European Commission, 2020:64). In the case of the content that can impair the well-being of minors, media service providers are obliged to make such content and programmes available in a manner that minors will not normally be able to see or hear them, for example, by selecting the time of broadcasting, relying on age verification tools and other technical measures. Concerning the most harmful content, the revised Directive mentions gratuitous violence and pornography, subject to the strictest measures (Article 6a) – *through a system of content descriptors, an acoustic warning, a visual symbol or any other means, describing the nature of the content* (Recital 19). The adopted measures need to be proportionate to the potential harms.

Finally, “Member States shall ensure that media service providers **provide sufficient information to viewers** about content which **may impair the physical, mental or moral development of minors**. For this purpose, media service providers shall **use a system describing the potentially harmful nature** of the content of an audiovisual media service.” (Para 3) (emphasis added). Article 6a stipulates that personal data of minors collected or otherwise generated by media service providers – in line with the GDPR principle of purpose limitation – should not be processed for commercial purposes such as direct marketing, profiling and behaviourally targeted advertising (para.2/Recital 21).

As noted, Article 6a applies to all media service providers, that is to say, broadcasters, VSPs, and VODs, including social media platforms, commercial communication (see more: Article 9), and user-generated content. Given its broad scope and margin of discretion left to MSs, there is some flexibility on how these obligations will be enforced and implemented.

Concerning video-on-demand services, the revised AVMSD (Article 28b) requires VSPs to take appropriate measures and protect:

- (a) **minors** from programmes, user-generated videos and audiovisual commercial communications which may **impair their physical, mental or moral development** in accordance with Article 6a (1);

- (b) **the general public** from programmes, user-generated videos and audiovisual commercial communications containing **incitement to violence or hatred directed against** a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;
- (c) **the general public** from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an **activity which is a criminal offence under Union law**, namely public **provocation to commit a terrorist offence** as set out in Article 5 of Directive (EU) 2017/541, offences concerning **child pornography** as set out in Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council<sup>1</sup> and offences concerning **racism and xenophobia** as set out in Article 1 of Framework Decision 2008/913/JHA.” (Emphasis added)

It could be argued that para (b) and (c) also refer to minors as they can be also considered and increasingly are a part of the general public and audiences online. The revised Directive does not provide any guidance on this matter. However, read in conjunction with Article 6a which specifically addresses harmful content in the context of minors, it can be argued that VSPs are also required to protect minors from violent and hateful content, including content that constitutes a criminal offence under EU law.

In addition, given that Article 6a applies equally to VSPs, they are also required to protect minors from the most harmful content, such as gratuitous violence and pornography.

To that end, VSP service providers “*should be required to take appropriate measures to protect minors from content that may impair their physical, mental or moral development*” (Recital 47). The revised AVMSD introduces three sets of criteria for the assessment of the appropriate measures. The first two criteria apply to broadcaster and VSP services whereas the third one is specific to VSP services.

1. The first criterion indicates that implementation of these measures should take into consideration the applicable fundamental rights, most notably the right to respect for private and family life and the protection of personal data, the freedom of expression and information, the freedom to conduct a business, the prohibition of discrimination and the rights of the child (Recital 51).
2. The second criterion, stated in Recital 48, requires that “*the appropriate measures to protect minors and the general public should relate to the organisation of the content and not to the content as such*”, ensuring that VSP services are still protected under the umbrella of ‘mere conduits’ and exempted from responsibility for the content that is transmitted through their infrastructure.

3. The third guiding criterion introduces a set of indicators that VSP services should consider such as “*the nature of **the content** in question, **the harm** it may cause, the **characteristics of the category of persons** to be protected as well as **the rights and legitimate interests** at stake, including those of **the video-sharing platform** providers and **the users** having created or uploaded the content as well as **the general public interest.**” In addition, they need to be “**practicable and proportionate**, taking into account **the size of the video-sharing platform service** and **the nature of the service** that is provided” (Article 28b (3) (para 1 and 2)) (emphasis added). The imposed measures should not amount to ex-ante control or take the form of upload filters in line with Directive 2000/31/EC, the e-commerce Directive, which was updated and replaced with the DSA.*

Article 28b(3) introduces a list of potential measures and the list below includes only those that are relevant for the protection of minors:

1. Adapting terms and conditions to include the applied protective measures about programmes, user-generated content and commercial communication that may impair physical, mental and moral developments (including incitement to violence and hatred and discrimination against protected groups) ( a)
2. Establishing an operative and transparent reporting and flagging mechanism for users to report the content in violation of the protection principles.
3. Make available “*operating systems through which video-sharing platform providers explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point*” (e).
4. Age verification system for content that can be harmful to minors.
5. Establishing and “*operating easy-to-use systems allowing users to rate the content*” that can impair minors’ physical, mental and moral development (g). It is envisaged as an informational tool for users during the content upload, leaving it up to users to properly mark and categorise content (European Audiovisual Observatory 2021: 25)
6. Provide “*parental control systems that are under the control of the end-user concerning content which may impair the physical, mental or moral development of minors*” (h).
7. In addition, in line with Article 6a, VSPs should also introduce in the case of the most harmful content, content description, encryption, an acoustic warning or visual symbol and other technological means about the most harmful content  
(see also: European Audiovisual Observatory 2021: 20-25).



Member States are allowed to impose stricter measures without prejudice to the Articles 12 to 15 of Directive 2000/31/EC (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') or Article 25 of Directive 2011/93/EU (Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography).

Concerning the protection of the personal data of minors, Article 28b(3)(4) prohibits the processing of personal for commercial purposes, such as profiling, direct marketing and behaviourally targeted advertising, collected or otherwise generated by VSPs in the process of establishing and operating age verification and parental control system for content that can impair minors well-being.

Against the background of the detailed regulatory remit of Article 28b, VSPs are now fully integrated within the AVMSD regulatory framework. There is some flexibility left to the MSs in how these obligations will be enforced and implemented. "The Directive is very clear that regulatory powers fall on the individual platforms, leaving the issue of oversight to national regulatory bodies, but subject to the country-of-origin principle." (Barker, 2021: 389).

## Country case analyses

According to the new provisions, VSPs and SMSPs will have to comply with a series of obligations in the regulated areas, eliminate exposure of minors to harm and ensure that users are not exposed to unlawful content. Under Article 6a, all media services need to ensure that their audiovisual programmes, content or commercial communication does not impair the physical, mental and moral development of minors. In a similar vein, Article 28(b) requires MSs to ensure that VSP providers under their jurisdiction take appropriate measures relative to programme, content and user-generated content, including commercial communication to protect minors from harmful content (European Audiovisual Observatory, 2021:18). To that end, the revised AVMSD introduces a different set of measures that linear and non-linear services should apply to prohibit minors against the most harmful content – ensuring that minors cannot hear or see such content, age verification systems, content classification and rating, encryption, etc.

According to the European Audiovisual Observatory's report (Ibid.), "most legislations use a *verbatim transposition* of the provisions of the revised AVMSD. In some instances, the legislation specifically mentions that the *parental control system* is an appropriate measure to be taken by a VSP (GB). Some countries include not only content that may impair the physical, mental or moral development

of minors, but also require measures *to safeguard the morality of the services provided to minors* and propose the use of, along with the aforementioned techniques, *personal identification codes* (EE) or *“digital identification instruments”* (ES). The legislation also refers to *self-regulatory mechanisms* in this respect (EE, LV, NL, SI). As noted previously, an active role on the part of *the national regulatory authorities is identified in terms of their mandate to specify the rules* (FR, IE, PL) (Ibid.:25).” There is a lack of overview reports and data on the transpositions of the measures stipulated in Article 6a concerning nonlinear broadcasting services.

As it is still early to assess the effectiveness of the applied measures and for this report, the focus will be on Croatia – due to the language and cultural similarity, Sweden as this country voiced concerns over a limited ability to impose measures on VSPs that are not under their jurisdiction (Ibid: 69) and Spain as this country imposed stricter rules than those proposed by the AVMSD. The research utilised the database of Interactive searches across the national transpositions of the Audiovisual Media Services Directive.

**Table 4: The protection of minors against harmful content online, including strengthening protections on video-on-demand services - Overview**

The protection of minors against harmful content online, including strengthening protections on video-on-demand services		Comments
Policy objectives	<p>Higher degree of protection for the content which may impair the physical, mental or moral development of minors (Recital 20)</p> <p>The appropriate measures for the protection of minors equally applicable to television broadcasting and on-demand audiovisual media services. (Recital 20)</p> <p>Introduction of measures to protect minors on VSPs (Recital 47).</p>	Lack of active cooperation of regulators with VODs and VSPs providers that were not previously required to impose stringent measures.

The protection of minors against harmful content online, including strengthening protections on video-on-demand services	Comments	
<p>Relevant Revised AVMSD provisions (numbering according to the Consolidated version of the AVMSD) - see for reference the Excel AVMSD Tracking Table</p>	<p>Article 6a (1) - protection of minors in all audiovisual media services                      Article 6a (3) - information clause                      Article 9(1) (e) - prohibition of commercial communication of alcoholic drinks targeting minors                      Article 9(1)(g)- prohibition of commercial communication exploiting minors inexperience and credulity                      Article 28b(1)(a) - requirements for VSPs to protect minors from harmful content                      Appropriate measures (note: these measures are all analysed as 28(3)(3)):                      Article 28b(3)(3)(a)- changes of terms and services                      Article 28(3)(3)(d)-establishing user-friendly reporting mechanism                      Article 28b(3)(3)(f)-age verification system                      Article 28b(3)(3)(g)- content rating                      Article 28b(3)(3)(h)-parental control</p>	<p>The rules under Article 6a apply to all media service providers, and measures proposed are of general and technical nature. Article 9 deals specifically with commercial communication whereas Article 28b imposes rules for VSPs' content and commercial communication. Further rules for the protection of minors are analysed in the last chapter – 7. Strengthening provisions to protect children from inappropriate audiovisual commercial communication)</p>
<p>Relevant provisions of the Law on Electronic Media and/ or the Law on Advertising</p>	<p>Current Law on Electronic media does not cover issues about the protection of minors. Law on Advertising contains a provision for the protection of minors from harmful commercial content (Article 10 - protection of health and safety of individuals, Article 21 - special rules for the protection of minors, note: applicable to nonlinear and on-demand services during children programmes, Article 23 - the misuse of minors inexperience and credulity, Article 25 - protection of minors against violent content, Article 34-frequency of ad-breaks limitations, Article 46, 47 and 49- rules for advertising of alcoholic beverages, Article 50 - rules for advertising of tobacco products, Article 54,56 - promotion of gambling advertising, Article 60 - limited and prohibited advertising of pornography).                      VSPs are not regulated in the existing audiovisual media regulation.</p>	

	<p><b>The protection of minors against harmful content online, including strengthening protections on video-on-demand services</b></p>	<p><b>Comments</b></p>
<p>Transposition of the 2018 revision of the AVMSD in selected EU Member States</p>	<p>Member State 1: Croatia in-depth analyses and relevance to Serbia</p> <p>Article 6(1)a - protection of minors in all audiovisual media services                      [HR] Law on Audiovisual Activities - consolidated version 19 July 2019 - Art. 20</p> <p>(6) The protection of minors from access to audiovisual content through electronic publications with the features established in paragraph 1 of this Article shall be effected by special regulations.</p> <p>Art.24(2) and (3):</p> <p>(2) Audiovisual media services and radio programmes and the content of electronic publications which may seriously impair the physical, mental or moral development of minors, in particular those involving gratuitous violence, shall be prohibited. For linear service providers, harmful content is prohibited unless the broadcasters select appropriate broadcasting time, enables age verification and other technical tools (3)</p> <p>Article 9(1)(e)- prohibition of advertising of alcoholic beverages targeting minors                      [HR] - The Electronic Media Act, Article 21(6) - verbatim to that of AVMSD</p> <p>Article 9(1)(g)- prohibition of commercial communication exploiting minors inexperience and credulity                      [HR] - The Electronic Media Act, Article 21(8) - verbatim to that of AVMSD</p> <p>Article 28b(1) - requirements for VSPs to protect minors from harmful content                      [HR] - The Electronic Media Act, Article 96(1) - verbatim to that of AVMSD</p> <p>Article 28(3)(3) - requirements for VSPs to protect minors from harmful content and proposed measures                      [HR]- The Electronic Media Act, Article 96(6-8) refers to several measures that VSPs can apply to ensure protection of minors (and the general public): applying terms and conditions, including in relation to commercial communication, reporting and flagging mechanisms, operating age verification and parental control system. Similar to those included in AVMSD.</p>	<p>The Croatian regulator opted to propose measures for on-demand services in a special regulation.</p> <p>Content containing gratuitous violence is prohibited.</p> <p>General prohibition of programmes that can impair a minor's well-being unless certain measures are put in place.</p> <p>Council for electronic media is responsible for assessing the applications and adequacy of the measures implemented by VSPs (Art.96, The Electronic Media Act).</p>

The protection of minors against harmful content online, including strengthening protections on video-on-demand services	Comments
<p>Member State 2: Spain in-depth analyses and relevance to Serbia</p> <p>Article 6(1)a - protection of minors in all audiovisual media services [ES] - Law 13/2022 of 7 July on General Audiovisual Communication - Art. 99</p> <p>Introduces a set of obligations to linear and nonlinear services, primarily focusing on information obligation, and lists appropriate measures (content description, audible warning) and support co-regulation (para.1). Broadcasting content containing gratuitous violence and pornography is prohibited. Other likely harmful programs need to be subjected to co-regulation and apply parental control or digital coding systems in place. Specific transmission time for “not under 18” programmes between 22.00 and 6.00 (para.2). On-demand services: inclusion of harmful content in separate catalogues, compliance with co-regulation and allowing for parental control and digital coding systems (para4).</p> <p>Article 9(1)(e)- prohibition of advertising of alcoholic beverages targeting minors [ES] - Law 13/2022 of 7 July on General Audiovisual Communication - Art. 123 3. point a) and e) - verbatim to that of AVMSD</p> <p>Article 9(1)(g)- prohibition of commercial communication exploiting minors inexperience and credulity [ES] - Law 13/2022 of 7 July on General Audiovisual Communication - Art. 124 1. and 2. - verbatim to that of AVMSD and in addition it includes limitations that seek to protect physical and mental integrity of the minors (f) and (g).</p> <p>Article 28b(1) - requirements for VSPs to protect minors from harmful content [ES] - Law 13/2022 of 7 July on General Audiovisual Communication - Art. 89 1., 90 and 92 - verbatim to that of AVMSD</p> <p>Article 28(3)(3) - requirements for VSPs to protect minors from harmful content and proposed measures [ES] - Law 13/2022 of 7 July on General Audiovisual Communication - Art. 89 1., 90 and 92 - verbatim to that of AVMSD</p>	<p>Prohibition of the most harmful content on linear services, and/or application of measures to protect minors, including specific transmission time. For on-demand services, there is no strict prohibition except to introduce separate catalogues that contain harmful content and allow parental control and digital coding systems.</p>

<p><b>The protection of minors against harmful content online, including strengthening protections on video-on-demand services</b></p>	<p><b>Comments</b></p>
<p>Member State 3: Sweden in-depth analyses and relevance to Serbia</p> <p>Article 6(1)a - protection of minors in all audiovisual media services                      [SE] Radio and Television Act - (2010:696) – consolidated 30 June 2022 - Art. Chapter 5, Section 2; Chapter 16, Sections 1-2; Chapter 17, Section 13                      Harmful content is generally prohibited on television during such time and way that increases the risk for children to see or hear them. This rule is also applicable to on-demand service providers.</p> <p>The Chancellor of Justice and The Swedish Broadcasting Commission are responsible to examine the programmes after they have been broadcasted and provided on on-demand services to establish if they contain depictions of violence and pornography content and if they comply with the proposed measures (Chapter 16, Section 1-2, Art.1 and Art.2)</p> <p>Article 9(1)(e)- prohibition of advertising of alcoholic beverages targeting minors                      [SE] Radio and Television Act - (2010:696) – consolidated 30 June 2022 - Art. Chapter 6, Section 2 and Chapter 8, section 14                      The Article does not specifically mention minors and refers only to product placement practices in which case the promotion of alcoholic beverages is prohibited.</p> <p>Article 9(1)(g)- prohibition of commercial communication exploiting minors' inexperience and credulity                      [SE] The Marketing Act (2008:486) – Consolidated 1st January 2021 - Art. 4                      The process of implementation of this provision was postponed to consolidate the legislative framework with other Directives tackling a similar set of issues.</p> <p>Article 28b(1) - requirements for VSPs to protect minors from harmful content                      [SE] Radio and Television Act - (2010:696) – consolidated 30 June 2022 - Art. Chapter 9a, Sections 1, 3 and 13; Chapter 16 Section 3 2nd paragraph points 3, 4aa and 9a; Chapter 17 Section 11a                      Introduces the same provision as for the broadcasting and on-demand services but does not go further to include appropriate measures mentioned in Article 28b(1)</p> <p>Article 28(3)(3) - requirements for VSPs to protect minors from harmful content and proposed measures                      [ES] - Law 13/2022 of 7 July on General Audiovisual Communication - Art. 89 1., 90 and 92 - verbatim to that of AVMSD</p>	<p>Special body dedicated to assessing the notions of harmful content after the content is made available to the public. No measures are listed and mentioned in the provision.</p> <p>The same rules on harmful content apply to broadcasters, VODs and VSPs.</p>

The protection of minors against harmful content online, including strengthening protections on video-on-demand services	Comments
<p>Proposed regulatory interventions and implementation measures</p> <p>HR:</p> <ul style="list-style-type: none"> <li>- For all media service providers – the most harmful content prohibited;</li> <li>- For broadcasters – harmful prohibited unless they introduce appropriate measures;</li> <li>- A special body dedicated to propose a set of adequate measures for on-demand services;</li> <li>- Rles on protection of minors vis-a-vis inappropriate and deceptive commercial communication verbatim to AVMSD;</li> </ul> <p>ES:</p> <ul style="list-style-type: none"> <li>- Encourages co-regulation throughout the entire legal act;</li> <li>- Broadcasting content containing gratuitous violence and pornography is prohibited;</li> <li>- Likely harmful programs need to be subjected to parental control or digital coding systems in place;</li> <li>- Specific transmission time for “not under 18” programmes: between 22.00 and 6.00 (para.2);</li> <li>- For on-demand services: separate catalogues, compliance with co-regulation and allow for parental control and digital coding systems;</li> </ul> <p>SE:</p> <ul style="list-style-type: none"> <li>- The proposed measures are equally applied to all media service providers.</li> </ul>	

## Conclusions and recommendations

The country analysis has demonstrated that the selected countries have transposed the relevant provisions for the protection of minors as they were stipulated in the Revised AVMSD. About Article 6a, applicable to all media service providers, the legislators in Croatia and Spain have prohibited the transmission of programmes that contain gratuitous violence or pornography. For the harmful content that may impair the physical, mental and moral development of minors, regulators have put forward several measures that media service providers should comply with: a special broadcasting time - the night programme or in a way that does not pose the risk that minors can see or hear them, digital coding system or parental control and more specifically for on-demand a separate catalogue and digital coding systems. In Sweden, harmful content is allowed if certain measures and conditions are put in place and the requirements are the same for all media service providers. In addition, Croatia and Sweden have also specified dedicated bodies that will monitor the application and effectiveness of the measures introduced by service providers, and in some instances even assess the harmful content, like in the case of Sweden with due consideration for the protection of freedom of expression.

In general, the country's regulatory authorities have already expressed concerns about the implementation of obligations vis-à-vis VSP services as there is an information asymmetry to accessing data and monitoring their activities. Therefore, engaging VSPs is deemed crucial to ensure that monitoring is suitable (for oversight of different platform functionalities and services), facilitated through international cooperation, clear to both regulators and VSPs and flexible given different sizes, scales and dynamics on various VSP platforms. Thus, there is no one regulatory approach and monitoring exercise that can resolve all the emerging problems. For all of these reasons, inter-sectoral and cross-border cooperation, in particular engagement with the European Platform of Regulatory Authorities, is necessary to accelerate and disseminate best practices, including the protection of minors in a converging media environment (European Audiovisual Observatory, 2021: 69-71).

In sum, we have considered the following recommendations for the Serbian transposition process:

1. The Law on Electronic Media as well as Law on Advertising, including other media-related laws need to be aligned with the proposed measures for the protection of minors, in particular:
  - Art. 6a introduces a set of requirements for the protection of minors against content and programmes that can impair their physical, mental and moral development, alongside the obligations about the most harmful content that can be either fully prohibited or allowed under the strictest measures, in line with national policy and societal objectives. The regulators in Serbia have at their disposal a variety of measures (see more Recital 20,



Article 6a) but any proposed measure needs to safeguard freedom of expression and the public's right to know, including the children.

- Art. 9 – concerning commercial communication and protection of minors - need to be fully integrated with the Law on Advertisement and the material scope of the Law expanded to cover all media service providers, in particular, on-demand services and other forms of audiovisual content such as broadcasting programmes and on-demand content and commercial content available on these services.
2. There is a clear need to expand the Law on Electronic Media scope to include VSPs' obligations concerning the protection of minors. They should specify the status of prohibited content, and effective measures of protection both of technical and programmatic nature, including information obligation for parents and guardians. However, given the country-of-origin principle and the lack of data and reports about the effectiveness of the imposed measures, it would be appropriate to consider postponing the inclusion of more detailed measures under Article 28(3)(3) until more information is available.

## Looking ahead

The threats and harms posed to minors in the media environment will continue to evolve and proliferate. The safety of minors and the protection of their well-being will remain high on the EU policy agenda as the current regulatory proposals and acts already centre online safety as one of their policy goals. For example, the DSA stipulates that obligations imposed on online intermediaries need to guarantee different public policy objectives like safety and trust, including the protection of minors and vulnerable users (Recital 34). The required set of measures imposed by these two regulatory instruments have a different material scope, but their goals are aligned: the protection of minors and the creation of a safe media environment.

VSPs and SLMPs have been extensively addressing the problem of disseminating harmful content on their platforms. In the case of Facebook and Google, their terms and conditions already contain rules applicable globally and to different types of content deemed harmful under their standards. Given the set of requirements and measures stipulated in the revised AVMSD, there may be a potential overlap between the rules imposed by the VSPs and national regulators. This overlap can cause legal uncertainty and the risk that the same service has to comply with conflicting requirements. Similarly, the largest VSPs have already introduced different measures like age verification and limitation system, and parental control tools, including a ban on commercial communication on tobacco products, gambling, weapons, etc.) (European Audiovisual Observatory, 2021: 58,65,66).

In the future, the countries that are home to the large VODs and VSPs providers (Ireland, the Netherlands, Spain) will set the standards for the protection of minors in an online environment and monitor the compliance of global standards for the protection of minors set forth by VSPs with national policy and safety objectives. The VSPs and VOD companies have proven to be a tough nut to crack and their internal rules and global standards are usually blind to local needs and policy objectives, including the protection of minors, thus cross-border cooperation and joint efforts are of crucial importance.

## 4. Reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences

### Analyses

The Revised AVMSD encompasses a broad range of delicate content regulation matters, aimed at combating racial, religious and other types of hatred by having reinforced rules to combat the incitement to violence or hatred, and public provocation to commit terrorist offences. The rationale of the revision was closely connected to the experiences of EU citizens, who reported various limitations in engaging with public discourses on the internet and specifically on social media because of “(...) hate speech, threats or abuse directed against people active on social media” whereby “(...) these experiences made them hesitant to engage in online debates” (European Commission, 2016a):50). The AVMSD - already before the revision - required MSs to ensure that audiovisual media services provided under their jurisdiction do not contain any incitement to hatred or disseminate it across borders. *Illegal hate speech* was defined according to Article 21 of the EU Fundamental Charter<sup>22</sup> and the Council Decision of 2008<sup>23</sup>. Importantly, the EU-wide self-regulatory instrument on counter-

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22 Article 21 - Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”; Charter of Fundamental Rights of the European Union, 2012/C 326/02, OJ C 326, 26.10.2012, p. 391–407.

23 Article 1 - Offences concerning racism and xenophobia

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin”; Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law OJ L 328, 6.12.2008, p. 55–58.

ing illegal hate speech online (European Commission, 2016b) also referred to the same legal sources.

Furthermore, the Revised AVMSD extended the scope of application of Article 6 to VSP providers with separate obligations for them (to take appropriate measures to protect the general public from programmes, user-generated videos and commercial audiovisual communications containing incitement to violence or hatred). In contrast, the rules applicable to linear and non-linear audiovisual media services were further aligned to reflect the realities of the changing media landscape (Rozgonyi, 2020) (see: Chapter 2 on ‘The extension of certain audiovisual rules to video-sharing platforms and social media services’).

### A brief overview of the relevant articles of the Revised AVMSD

According to Recital (17), the Revised AVMSD aimed at ensuring coherence and legal certainty for businesses and MSs’ authorities, therefore it was necessary, to be precise, the notion of ‘incitement to violence or hatred’ was - to the appropriate extent - understood within the meaning of Council Framework Decision 2008/913/JHA (1). Furthermore, Recital (18) refers to the considerations about “the evolution of how content is disseminated via electronic communications networks”, therefore, it was important “to protect the general public from incitement to terrorism” and therefore to ensure that “audiovisual media services do not contain public provocation to commit a terrorist offence”. In this regard, precision was also necessary to “ensure coherence and legal certainty for businesses and MSs’ authorities”, thus “the notion of ‘public provocation to commit a terrorist offence’ should be understood within the meaning of Directive (EU) 2017/541 of the European Parliament and of the Council”.

The new provision of the Revised AVMSD reads as follows:

#### “Article 6

1. Without prejudice to the obligation of Member States to respect and protect human dignity, Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any:

(a) incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;

(b) public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.

2. The measures taken for the purposes of this Article shall be necessary and proportionate and shall respect the rights and observe principles set out in the Charter.”

The novelty of the Revised AVMSD was (1) the *precision of the definition and reference to the EU Fundamental Charter*; and (2) the *inclusion of public provocation to commit a terrorist offence under the scope of the provisions*. The below comparison between the provisions in Article 6 in the AVMSD (2010) and after the revision (2018) highlights the key changes in the legal texts.

**Table 5: Comparison of the provisions in Article 6 in the AVMSD (2010) and after the revision (2018)**

<p>Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)</p>	<p>Article 6                  “Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.”</p>
<p>DIRECTIVE (EU) 2018/1808 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) given changing market realities</p>	<p>Article 6                  “1. Without prejudice to the obligation of Member States to respect and protect human dignity, Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any:                  (a) incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;                  (b) public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.                  2. The measures taken for the purposes of this Article shall be necessary and proportionate and shall respect the rights and observe principles set out in the Charter.”</p>

## Country case analyses

The implementation across the EU of the reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences do not indicate any country-specificities. Therefore, the selection of the country cases was based on the criteria of most-similar cases in terms of market size and geographical location (regional similarities). Thus, Bulgaria (BG) was closely studied because of regional similarities relevant to hate speech; Croatia (HR) because of regional and jurisdictional similarities, and Romania (RO) because of regional similarities about hate speech. The research utilised the database of [Interactive searches across the national transpositions of the](#)

Audiovisual Media Services Directive<sup>24</sup> (see Table 6: The reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences - overview).

**Table 6: Reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences - Overview**

Reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences		Comments
Policy objectives	Combat racial, religious and other types of hatred by having reinforced rules to combat the incitement to violence or hatred, and the public provocation to commit terrorist offences.	
Relevant Revised AVMSD provisions (numbering according to the Consolidated version of the AVMSD) - see for reference the Excel AVMSD Tracking Table	Art. 6 (1) AVMSD Art. 6 (2) AVMSD	
Relevant provisions of the Law on Electronic Media and/or the Law on Advertising	Prohibition of hate speech - Article 51 of the Law on Electronic Media	
Transposition of the 2018 revision of the AVMSD in selected EU Member States	Member State 1: in-depth analyses and relevance to Serbia - Bulgaria (BG) Art. 6 (1) AVMSD [BG] Radio and Television Act - Art. 8 (1): <i>transposition of the AVMSD provision by identical (verbatim) wording.</i> Art. 6 (2) AVMSD [BG] Radio and Television Act - Art. 8 (2): establishing the obligation of the National Regulatory Authority to exercise its control powers and take measures which are necessary and proportionate and respect the rights and principles established in the Charter of Fundamental Rights of the European Union.	

24 AVMSD Articles: Art. 6 (1) and Art. 6 (2). County case studies: Bulgaria, Croatia and Romania.

Reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences	Comments
<p>Member State 2: in-depth analyses and relevance to Serbia - Croatia (HR)</p> <p>Art. 6 (1) AVMSD</p> <p>[HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 14:</p> <ul style="list-style-type: none"> <li>- <i>transposition of the prohibition of terrorist content by making reference to the Croatian Criminal Code;</i></li> <li>- <i>transposition of the provisions on hate speech by extending the scope of the grounds of hatred: “(2) In audio and/or audiovisual media services it shall be prohibited to incite, favour the incitement and spreading of hatred or discrimination based on race or ethnic origin or colour, sex, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, gender identity, expression or sexual orientation, as well as anti-Semitism and xenophobia, ideas of the fascist, nationalist, communist and other totalitarian regimes.”</i></li> </ul> <p>Art. 6 (2) AVMSD</p> <p>[HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 14 (2): no additional measures.</p>	<p>The scope of grounds for hatred is broader than the scope envisioned in Article 21 of the EU Charter of Fundamental Rights.</p>
<p>Member State 3: in-depth analyses and relevance to Serbia - Romania (RO)</p> <p>Art. 6 (1) AVMSD</p> <p>[RO] Law No 504/2002 of 11 July 2002 (the Audiovisual Act) - Consolidated 3 July 2022 - Art. 40 (1):</p> <ul style="list-style-type: none"> <li>- <i>hate speech: “(1) Audiovisual media services provided by providers under the jurisdiction of Romania shall not contain: (a) incitement to violence or hatred directed against a group of persons or a member of a group based on grounds such as gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation and contagious or non-communicable chronic disease;”</i></li> <li>- <i>terrorist content: making reference to the relevant law on preventing and combating terrorism in Romania.</i></li> </ul> <p>Art. 6 (2) AVMSD</p> <p>[RO] Law No 504/2002 of 11 July 2002 (the Audiovisual Act) - Consolidated 3 July 2022 - Art. 40 (2): establishing an obligation for the National Regulatory Authority to apply measures foreseen regarding hate speech in a manner that is necessary and proportionate and shall uphold the rights and observe the principles set out in the Charter of Fundamental Rights of the European Union.</p>	<p>The scope of grounds for hatred is broader than the scope envisioned in Article 21 of the EU Charter of Fundamental Rights.</p>

Reinforced protection against incitement to violence or hatred, and public provocation to commit terrorist offences		Comments
Proposed regulatory interventions and implementation measures	<p>It is recommended to</p> <ul style="list-style-type: none"> <li>- Revise the current Article 51 Prohibition of hate speech of the Law on Electronic Media and make explicit reference to Article 21 of the EU Charter of Fundamental Rights (minimum requirement);</li> <li>- Make reference to and establish the obligation of the REM to exercise its control powers and take measures which are necessary and proportionate while enforcing hate speech relevant provisions of the Law, and respect the rights and principles established in the Charter of Fundamental Rights of the European Union;</li> <li>- Amend the Law on Electronic Media and insert a provision on the prohibition of public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.</li> </ul>	<p>It is recommended to consider a broader scope of the ground of hatred to be included in the law. The Croatian and Romanian examples could serve as good cases for the Serbian legislators.</p>

## Conclusions and recommendations

Based on the analyses of the Revised AVMSD and the country case studies, we could conclude, that the Serbian legislators should

- Revise the current Article 51 Prohibition of hate speech of the Law on Electronic Media and make explicit reference to Article 21 of the EU Charter of Fundamental Rights (minimum requirement);
- Make reference to and establish the obligation of the REM to exercise its control powers and take measures which are necessary and proportionate while enforcing hate speech relevant provisions of the Law, and respect the rights and principles established in the Charter of Fundamental Rights of the European Union;
- Amend the Law on Electronic Media and insert a provision on the prohibition of public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.

Furthermore, it is recommended to consider a broader scope of the ground of hatred to be included in the law. The Croatian example could serve as a good case for the Serbian legislators.

## Looking ahead

The implementation of the legislative provisions concerning hate speech exposed national regulatory authorities to several challenges, especially in South-East Europe. Therefore, the Council of Europe has provided extensive support to the regulators in building capacity in this area of regulation. The 2017 report 'Media regulatory authorities and hate speech' ([Council of Europe, 2017](#)) contribute to a wider understanding of the concept of hate speech, offers a starting point in terms of providing recommendations and mechanisms for fighting against and preventing it, and to facilitate further efforts and initiatives. Therefore, it is recommended that the Serbian regulator - REM (who was also involved in the capacity-building process) - re-attends in further activities with the guidance provided by the CoE report.

Furthermore, the EU has recently adopted relevant legislation, namely the 'REGULATION (EU) 2021/784 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2021 on addressing the dissemination of terrorist content online'. The Regulation aims to 'ensure the smooth functioning of the digital single market in an open and democratic society, by addressing the misuse of hosting services for terrorist purposes and contributing to public security across the Union'. It is recommended to the Serbian legislators - while transposing the Revised AVMSD - to consider parallelly the new provisions of the 2021/784 EU Regulation and their relevance and applicability to the audiovisual online media content.



## 5. Increased obligations to promote European works for on-demand services

Protection and promotion of European works have been the cornerstone of the EU audio-media regulatory framework embedded in all the AVMSD revisions till today. Initially enshrined with a vision of protecting the European continent from the domination of the US film industry, and henceforth safeguarding European cultural identity and industry investments, for some authors, this approach can be perceived as a case of “upward regulation” (as an exception to a *horizontal nature* of the AVMSD) (D’Arma & Gangemi, 2021: 452-454). Increasingly, these obligations have also become means to address technological convergence, market concentration and transnational dominance of global streaming services. For example, by 2020, the supply of pay-on-demand services (SVOD) was more concentrated on VOD than on broadcasting services. In the same year, major VOD companies – Netflix, Amazon and DAZN – generated 75% of total revenue growth for pure VOD services and the top 20 European audiovisual groups accounted for 69% of the total market share (ERGA, 2021: 7-8).

The Television Without Frontiers Directive (TWFD) first laid down the obligations for linear services to ensure that most of their programme time is reserved for European works, including an additional obligation to invest (10% of their annual budget) in European film production. These “positive content regulations” (Broughton Micova, 2019: 12) and protectionist measures have been sustained in all the AVMSD iterations, including the 2018 revision. The Revised AVMSD kept the same mandatory quotas for broadcasters (Article 17). But, for the first time, it also introduced a quota system for video-on-demand services (VOD, Article 13). This expansion can be seen as one of the most relevant changes in this section in the latest revision of this Directive. Under certain conditions and “to ensure adequate levels of investment in European works” (Recital 36) and their economic effects, the AVMSD provisions also made it possible for MSs to derogate from the country-of-origin principle, a backbone of the EU audio-visual media policies since the first regulatory intervention in this field. MSs can now impose financial obligations to foreign VOD services targeting audiences in another country. However, given the minimal harmonisation nature of the AVMSD, European countries seem to be applying these provisions in different ways, thus some authors argue that this will result in further fragmentation of the European film industry market (European Audiovisual Observatory, 2022: 51) and that even with VODs services financial contribution to local cultural production, “small countries’ markets” such as those in Slovenia and Croatia will not see expected revenue growth (Kerševan Smokvina, 2021).

The imposition of the same promotional rules and quota system for non-linear and linear services is not without its obstacles and complexities that can be roughly categorised into two groups. The first group relates to the functionality features of the VOD services that are often algorithmically driven, non-transparent and agile, meaning that the MSs will face difficulties in opening up these black boxes in an attempt to ensure the compliance of VOD services with the required obligations. Relatedly, the second group of obstacles is more of a normative nature as the proposed monitoring measures (to assess compliance of the VOD services with the required obligations) seem to be more adequate for the broadcasting era, leaving the regulators in the MSs with no (exact) answer on how to enforce this provision, that subsequently can result in diverse application ranging from stringent and detailed measures to mere general requirement, similar to those stipulated in the revised AVMSD (Idiz et al, 2021: 434).

## Analyses

The AVMSD defines European works as i. those originating from the MSs or ii. in a state that is a party to the Council of Europe Convention on Transfrontier Television, including the works that are co-produced with producers in those states (MSs and countries parties of the noted Convention) or iii. “works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.” (Article 1(n)). The application of provisions under (ii) and (iii) is conditioned upon the non-discriminatory measures and treatment in the third country concerned. The European works shall be deemed as originating from the Member State or a part of the noted Convention under the following conditions:

1. one or more producers established in one or more MSs,
2. production is supervised and controlled by one or more procedures established in the Member State(s),
3. prevalence of co-contributions cost is preponderant to the total costs and co-producer(s) are established in those MSs (Article 1 (n, sub-para 3).

The proposed definition is without prejudice to definitions introduced by MSs that can lay down more detailed definitions by the Directive’s objectives. However, this leeway and preferential treatment of domestic cultural production are limited as the EU law prohibits discriminatory treatment of AVMS from other MSs (Idiz et al., 2021:429).

To improve the supply-side and production of diverse European works and increase ‘exposure diversity’ (Helberger, 2018) on global VOD services<sup>25</sup> (Idiz et al., 2021: 426), the revised AVMSD lays down several specific promotional obligations for non-linear and linear services under the jurisdiction of the MSs. They require the MSs to ensure that:

1. all public or private (Recital 65) broadcasters reserve the majority of their broadcasting time “excluding the time allotted to news, sports events, games, advertising, Teletext services and teleshopping” for European works (Article 16). There are “no conditions related to the cultural or societal value of the works (Broughton Micova, 2019: 12)”, and
2. at least 10% of their transmission time for European works “*alternatively*, at the discretion of the Member State” and at least 10% of their programming budget for European works created by independent content production (Article 17).

To meet the requirements, the broadcasters should earmark an adequate portion of recent works transmitted within 5 years of their production and distribution. In the case of broadcasters, the revised AVMSD provided guidelines for the MSs on how to ensure and monitor compliance.

More importantly, Article 13 introduced the obligations for VOD services to promote the production of and access to European works (para (1)). Promotion can be understood, *inter alia*, as

1. a financial contribution to cultural production “*including via direct investment in content and contribution to national funds*” (Article 13(1)). Thus, MSs have two different ways at their disposal to implement financial obligation of VOD services: direct investments and/or levies payable to a fund (Article 13(2)); and
2. the prominence of European works in their catalogues. The AVMSD defines prominence as “promoting European works through facilitating access to such works” (Recital 35) and this obligation should be applied by ensuring that VOD service providers’ catalogue contains “*a minimum share of European works and that they are given sufficient prominence.*” Article 13(2) specifies a mandatory minimum of 30% content quota for European works in their catalogues (Article 13(1)).

In effect, the final objective of this provision is to promote the production and distribution of European works and cultural diversity, and for linear services these contributions can be carried out in

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<sup>25</sup> Art 1. (g) defines the ‘on-demand audiovisual media service’ (i.e., a non-linear audiovisual media service): “an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his request based on a catalogue of programmes selected by the media service provider.”

two ways: rights acquisition of European works and direct financial contribution and/or through levies payable to a fund, based on the revenues that are generated in or targeted towards their audience (Recital 36, see also: European Audiovisual Observatory, 2022:4 and Idiz et al., 2021: 426.)<sup>26</sup>. The important difference between the two types of financial contribution is that the former “can be recouped by exploiting the relevant economic rights, levies payable to national funds do not provide any direct benefit in return, even if the services may benefit from public funding provided by the beneficiaries of the levies” (European Audiovisual Observatory, 2022: 24). Some authors also raised a problem referred to as “quota quickie” as VOD services providers, such as Netflix can purchase old and cheap, including any type of content to meet the quota requirement of the European works. For example, a study in the Netherlands showed that the top 10 most viewed European films in the Netflix catalogue are by large Netflix originals, so users are more likely to see them than other licensed European works. The study highlights that “VOD services can make little to no changes and nevertheless maintain that they have met the prominence requirement” (Idiz et al., 2021: 429-433).

Another recurring problem is the lack of guidelines in the revised AVMSD on the implementation of this provision, especially through personalised VOD services, alongside a persistent transparency problem. VOD services are often reluctant to make available their content performance data (Idiz et al., 2021: 432, 437). Recital 35 sheds some light on how to implement the prominence obligation laid out in Article 13(1):

*“The labelling in the metadata of audiovisual content that qualifies as a European work should be encouraged so that such **metadata are available to media service providers**. Prominence involves promoting European works by facilitating access to such works. Prominence can be ensured through various means such as a **dedicated section for European works** that is accessible from the service homepage, **the possibility to search** for European works in the search tool available as part of that service, **the use of European works in campaigns** of that service or a **minimum percentage of European works promoted from that service’s catalogue, for example by using banners or similar tools**.” (Emphasis added).*

As noted, these regulatory tools are designed for linear services whereas nonlinear services have significantly different distribution and consumption logic and functionalities, as their catalogue is not connected to a scarcity problem of linear service providers. In addition, it is interactive and con-

<sup>26</sup> Recital (35): Providers of on-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogues contain a minimum share of European works and that they are given sufficient prominence.

stantly changing as content is removed or added, and more importantly, algorithmically optimised to meet a personal set of preferences of individual users (as opposed to the general obligation to promote European works), which further also renders difficulties in implementation of the prominence obligation (Idiz et al., 2021: 432-433). So, without clear guidelines from the European Commission and other expert organisations (EPRA and ERGA), including assessment of the application and effect of these provisions in the major countries of origin of VOD services (e.g., the Netherlands and Ireland), the overall benefit of these provisions is uncertain (Ibid.: 434). In practice, however, the fundamental difference between the two forms of financial contribution is essential as they define “who controls the funding, which has direct implications for the type of production incentivized. (Ibid.: 434).”

In addition to expanding the scope of promotional obligations to include VOD services, Article 13 also enabled countries to introduce a discretionary measure by requiring “*media service providers **targeting audiences in their territories, but established in other Member States** to make such financial contributions, in a proportionate and non-discriminatory manner*” (emphasis added) (Article 13(2)). Recital 38 specified that this decision needs to be made on an individual basis taking into consideration the following criteria: “*advertisement or other promotions specifically aiming at customers in its territory, the main language of the service or the existence of content or commercial communications aimed specifically at the audience in the Member State of reception.*” The leeway provided for targeted MSs prompted some authors to label this provision as a “Netflix tax” (Idiz et al., 2021; Kerševan Smokvina, 2021: 472). The “Netflix tax” represents a derogation from the country-of-origin principle – that lies at the heart of the European media policy; thus, it is particularly relevant as VOD services primarily should comply with the obligations imposed by the country of origin, that is to say, of their establishment (D’Arma & Gangemi, 2021:455). For example, in the case of the largest VOD services, such as Netflix, Amazon, and Disney, the Netherlands is the country of origin, so the rules imposed by this country and their regulator will set the terms of application for promotional obligations.

However, to ensure an equal level of redistribution of allocated investments, this derogatory provision enables “the national investment and financial obligations can be applied to cross-border services, even if they are established and regulated in another member state.” (Kerševan Smokvina, 2022: 472). The financial obligation, in these cases, can be only based on “*the revenues earned in the targeted Member States*” (Article 13 (3)). MSs where VOD services are established, if it imposes such a financial obligation, should take into account the contributions imposed by the targeting country. In any case, the financial obligation imposed on VOD services will not apply to providers with a low turnover or a low audience, including where they are impracticable or unjustified because of the nature or theme of the audiovisual media services (para.6).

Importantly, this obligation includes *only a financial contribution component*, while the quota for European works and the prominence rules are specifically and only subject to the country-of-origin principle (Idiz et al., 2021: 430). Essentially, by reversing to country of destination principle, this provision sought to “reduce the regulatory asymmetry between traditional broadcasters and VOD providers, by putting in place EU-wide European works obligations on VOD services”, but equally important by “allowing destination countries to require contributions to domestic production” (D’Arma & Gangemi, 2021: 455).

## A brief overview of the relevant articles of the Revised AVMSD

The revised AVMSD recognizes the pivotal role of all media services, including VOD providers in the distribution, access and production of European cultural works, as such they are required to actively promote and invest in cultural production and diversity. The first forms of rules for VOD services were introduced in the 2007 AVMSD, and later codified in the 2010 revision, but were rather vague and of general nature, requiring VOD services to promote European works through the production of and access to these works. Such promotion could take the form of financial contribution to the production and right acquisition and/or prominence of the European works in their catalogues, without explicitly mentioning the quota requirements and other obligations. With the dominance and expansion of on-demand service providers and their global impact on cultural production, this “light legislative touch” (European Audiovisual Observatory, 2022: 13) has shifted to include more stringent forms of rules.

The 2018 revised AVMSD imposes obligations on VOD services to include a 30% share of European works and a prominence obligation concerning those works (Article 13(1)). Article 13(2) stipulates that MSs may also require AVMS providers (both broadcasters and on-demand AVMS) under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, including financial obligations for providers targeting audiences in their territories, but established in other MSs. In essence, this financial contribution can:

*“take the form of **direct contributions** to the production of and **acquisition of rights** in European works. The Member States could also **impose levies payable to a fund**, based on the revenues generated by audiovisual media services that are provided in and targeted towards their territory” (emphasis added) (Recital 36).*

In that sense, the AVMSD regulatory approach is graduated, as three regulatory ties impose different levels of obligations to linear and non-linear services with the fewest requirements imposed on VOD services, as “the rules on the promotion of independent productions, which apply to linear AVMS, [are] out of the regulatory context for on-demand AVMS.” (Idiz et al. 2021: 429). In addition to the promotional obligation of independent production, Article 16 and Article 17 respectively, require broadcasters to allocate the majority of their broadcasting time to European works and reserve 10% of their transmission or, inter alia, invest a minimum of 10% of their programming budget for the independent production of European works.

While the 2018 AVMSD did not significantly change obligations for broadcasters, the regulatory landscape for VOD services is dramatically different. Under the revised AVMSD, the VOD service providers are required to invest in the distribution and production of European works. MSs now have to ensure that VOD service catalogues include at least a 30% share of these works alongside the prominence obligations of those works. There are different ways to achieve prominence, for example, by dedicating a specific section on the platform for European Works, accessible from the homepage, enabling a search option for European works, using these works in campaigns of that service, other forms of promotion through banners or similar tools (Idiz et al., 2021: 429; Recital 35). In addition, and optionally, they can also impose the financial obligation to VOD services under their jurisdiction, for example, “*via direct investment in content and contribution to national funds*” (Article 13(2)).

Another significant novelty in the context of VOD services is also stipulated in Article 13 and it enables MSs to impose financial contribution obligations on media service providers set in other MSs that target its territory, based on the revenues generated within that state (see also: Idiz et al., 2021: 429). The rationale for this exception is provided in Recital 36:

*“[...] The Member States could also **impose levies payable to a fund**, based on the revenues generated by audiovisual media services that are provided in and **targeted towards their territory**. This Directive clarifies that, **given the direct link between financial obligations and Member States’ different cultural policies**, a Member State is also allowed to **impose such financial obligations on media service providers established in another Member State that target its territory**.” (Emphasis added).*

The possible derogation from the country-of-origin principle is possible only for the financial obligations in line with Article 13(2). The AVMSD provides a set of criteria - “the main criterion being a commercial gain at the targeted decisions” (European Audiovisual Observatory, 2022: 23) - to assess whether a VOD service provider established in another jurisdiction is targeting audience in its territory: “*advertisement or other promotions specifically aiming at customers in its territory, the main lan-*

*guage of the service or the existence of content or commercial communications aimed specifically at the audience in the Member State of reception”* (Recital 38). On the other hand, the country of jurisdiction, when calculating the financial contribution of the VOD service providers that are subject to contributions imposed by the targeted country, should take into account this contribution and avoid double imposition to media service providers (Recital 39).

AVOD service provider with no significant market share or with low turnover and low audience should be excluded from this financial obligation to promote European work in an effort not to “undermine market development and in order to allow for the entry of new players in the market” (Recital 40). The revised AVMSD provides that this could be assessed based on *“a viewing time or sales, depending on the nature of the service, while the determination of low turnover should take into account the different sizes of audiovisual markets in the Member States.”* In addition, the imposition of this financial requirement may be inappropriate *“in cases where, given the nature or theme of the audiovisual media services, they would be impracticable or unjustified”* (Recital 40).

More clarity on the assessment of low turnover and the low audience is provided in the European Commission Guidelines (European Commission, 2020) that apply only to the providers subjected to the obligations in a targeted Member state. According to the Guidelines, the specific base for calculation should be a total turnover, taking into account those of partners and linked enterprises and should not exceed a two-million-euro turnover (ibid.: 20). Concerning the low audience, several indicators should be considered: i. The subscription on video on demand: number of active users, paying subscribers, ii. Transactional video on demand: number of unique customers and accounts used for acquisition of works., and iii. Advertising video on demand: number of unique visitors (ibid.: 21). In principle, the Guidelines conclude that it is appropriate “to exempt from the obligations under Article 13 AVMSD those providers that have an audience share of less than 1% in the member state concerned. About Article 13(2), this means that “these providers are exempted by the targeted member state from the obligation to contribute financially to the production of European works” (ibid.: 22). However, and against the noted exemptions, some MSs may decide to impose the financial contribution rules to low turnover/audience VOD services if they are deemed relevant in their country and duly justified cases, if it is in line with their cultural policy objectives like ensuring competitiveness and sustainability of national audiovisual and film funding system (ibid.: 24).

## Country case analyses

The cultural policy toolkit, briefly defined as a set of policies and measures to promote cultural diversity in one country, besides promotional and financial investments of media service provid-



ers, also encompasses subsidies from public broadcasters, different media ownership rules, direct public funding, producer investments (D'Arma & Gangemi, 2021: 452, see also Kerševan Smokvina, 2021: 473). Against this background, countries have diverse policy toolkit mechanisms to incentivize and promote domestic cultural production. So, the first decision that the legislators in the MSs should make is whether to introduce the financial obligation and if so, a further choice must be made between two types of obligations: direct investment (production and/or right acquisition) and payable levy system. According to a report from the European Audiovisual Observatory, “most MSs have opted to introduce direct investment obligations, as the sole option, as an alternative to levies, or as a cumulation of both options. Only three MSs (Germany, Poland and Ireland) have introduced levies without any direct investment obligation” (European Audiovisual Observatory, 2022: 25).

However, it is also true that countries that are home to large VOD services, predominantly Ireland, the Netherlands, Germany, and Spain and/or already have advanced domestic production benefit greatly from imposed financial obligations for media service providers (ERGA, 2021: 8). For this reason, the introduction of the ‘Netflix tax’ under Article 13, according to some authors, “marks ‘a new area’ of audiovisual policy intervention in Europe” (Kostovska et al., 2020: 438) and is perceived as a potential game-changer in the European cultural production and internal market. The ‘Netflix tax’ is seen as an instrument that could effectively tackle a persistent ‘deficit’ problem, present since the inclusion of promotional obligations in the European audiovisual media policy framework. Namely, small states<sup>27</sup> with limited market resources and cultural production have not been able to harness the financial and promotional opportunities, in the same way (and scale) as the “larger” countries (Kerševan Smokvina, 2021: 478). Thus, it does no surprise that France and Germany were the first countries to introduce the ‘Netflix tax’. According to a 2014 German audiovisual media regulation, VOD services with turnover above half a million euros are subject to a levy to the German film fund and France set the 2% VOD tax to foreign services, finally cleared after the CJEU decision that rejected the Netflix appeal on this matter (Netflix International BV and Netflix, Inc. v. European Commission 2018; see also: Kerševan Smokvina, 2021: 473).

As noted previously, the selected modalities of financial contributions (levies or direct investment) will have a decisive impact on who controls the funds for the production of European works. In the case of the Netherlands which is home to large VOD services, the public broadcaster and the Netherlands film fund favoured a levy system as it was the simplest measure to apply and monitor, providing those bodies that facilitate the funds with more investment control both in terms of expendi-

27 “According to some analysis of the relevant literature on this matter, population size is used as an indicator to define size of the state. Thus, the World Bank parameters suggest that small countries are those with a population below 1.5 million while others draw the line at 18 or 20 million (from the same article, Puppis, 2009; Picard, 2011), but other features market and audience size, etc.” (Kerševan Smokvina, 2021: 474).

ture and diversity of the production. Direct investment was a preferred option for service providers as “it is more sustainable and less market-distorting if they can choose how to invest and that direct investment gives them more incentives to stay active in the Dutch market” (Idiz et al., 2021: 435). The same study concludes that “the type of financial obligation (levy or direct investment) directly impacts the type of content produced and, as such, is a source of controversy and debate in the local audiovisual industry” (Idiz et al., 2021: 427). The noted study offers important insights for the “small media markets and audience” countries with language and cultural specificities, like Slovenia, Croatia, Denmark or Sweden.

Against the background of the previous analysis, the following countries are included in the analysis:

- the Netherlands as this country is home to large VODs services and it was briefly explored in this chapter so the readers are already familiar with their regulatory approach, further explored in the following lines;
- Croatia - that is not only relevant because of the policy and cultural proximity to Serbia but has also introduced the ‘Netflix tax’;
- Denmark is also relevant as a small market country with language and cultural specificities whose regulatory measures can provide additional guidelines for the legislators in Serbia.

The research utilised the database of Interactive searches across the national transpositions of the Audiovisual Media Services Directive and the IRIS publication on the Dutch New bill concerning VODs platforms (Fathaigh, 2022) that did not enter into the force. Nevertheless, it provides crucial insights into the Dutch interventions in this field. In parallel, this country analysis is based on the European Parliament Study on the implementation of the revised AVMSD (European Parliament, 2022).

**Table 7: Increased obligations to promote European works for on-demand services - Overview**

Increased obligations to promote European works for on-demand services		Comments
Policy objectives		
Relevant Revised AVMSD provisions (numbering according to the Consolidated version of the AVMSD) - see for reference the Excel AVMSD Tracking Table	<p>Recital35 - inclusion and prominence requirements for VODs. Measures to ensure prominence;</p> <p>Recital36 - financial obligations for media service providers;</p> <p>Rec36 - “targeted” Member State derogation principle;</p> <p>Recital 38 and 39- criteria for assessing if VODs established in another Member State target audience in another Member State territory;</p> <p>Recital40 - exemption of media service providers with insignificant presence, low turnover and/or low audience;</p> <p>Article 13 - inclusion of 30% of European works alongside prominence obligation for VODs (para.1);</p> <p>Article 13 - Financial contribution requirements for VODs (para.2);</p> <p>Article 13 - Targeted Member State – derogation from the country-of-origin principle (para. 2 and 3);</p> <p>Article 13 - Low turnover/audience exemption 6).</p>	<p>Ensuring adequate levels of investments in European works.</p> <p>Ensuring promotion and distribution of European works.</p> <p>Levelling the playing field of linear and nonlinear service providers investments in and promotion of European works.</p> <p>Country of destination principle enabled for MSs that are targeted by the VODs content.</p>
Relevant provisions of the Law on Electronic Media and/or the Law on Advertising	<p>The Law on Electronic Media and/or the Law on Advertising do not regulate this subject. However, the Law on cinematography (Official Gazette no.99/2011, 2/2012 and 46/2014) is relevant but does not incorporate the noted AVMSD provisions.</p>	

Increased obligations to promote European works for on-demand services		Comments
Policy objectives		
Transposition of the 2018 revision of the AVMSD in selected EU MSs	<p>Member State 1: the Netherlands in-depth analyses and relevance to Serbia</p> <p>Article 13 - inclusion of 30% of European works alongside prominence obligation for VODs (para.1)</p> <p>[NL] Policy rule of the Media Authority on recent European, independent media offerings, originally Dutch-language or Frisian-language programmes and programmes that are provided with subtitling for people with a hearing impairment - Art. 5 and 7</p> <p>verbatim to that of the revised AVMSD + includes calculation measures such as the number of European titles in the relevant catalogue set off against the total number of titles in the catalogue. Feature films and a season of series are regarded as titles (Article 5). Prominence can be achieved through:</p> <ul style="list-style-type: none"> <li>- the provision of a section dedicated to European productions accessible from the start page of the service;</li> <li>- the possibility of searching for European works in the search function a; or</li> <li>- the use of European works in the campaigns of that service or a minimum percentage of European works recommended in the catalogue of that service, for example through the use of banners or similar devices.</li> </ul> <p>Article 13 - Financial contribution requirements for VODs (para.2)</p> <p>[NL] Policy rule of the Media Authority on recent European, independent media offerings, originally Dutch-language or Frisian-language programmes and programmes that are provided with subtitling for people with a hearing impairment - Art.3.29e - requiring VODs providers to invest in Dutch audiovisual productions, which will amount to 4.5% of a provider's annual turnover. The investment obligation only applies to providers of on-demand services with a turnover of EUR 30 million per year which is generated in the Netherlands, including from advertising, subscriptions, user transactions, sponsorship, and product placement.</p>	<p>Quota system and prominence requirements similar to those in the revised AVMSD and the provisions also include calculation and prominence guidelines stipulated in the Recital. 35;</p> <p>VODs providers to invest in Dutch audiovisual productions, up to 4.5% of a provider's annual turnover applicable only to VODs with a turnover of 30 million per year, generated in the Netherlands.</p> <ul style="list-style-type: none"> <li>- direct investment</li> <li>- rights acquisition</li> <li>- acquisition of licences no older than four years</li> </ul> <p>Includes also a 'targeted' MSs provision that requires VODs established in another country to directly invest 4,5% of their annual turnover in the Dutch audiovisual sector.</p>

Increased obligations to promote European works for on-demand services		Comments
Policy objectives	<p>Article 3.29g sets out the types of financial requirements: (a) investment in Dutch productions or co-productions; (b) acquisition of an exploitation licence in respect of an unfinished Dutch production; or (c) the acquisition of an operating licence in respect of a Dutch production that is not older than four years at the time of acquisition. Finally, part of the investment should benefit independent producers to ensure a diverse range.<sup>6</sup></p> <p>Article 13 - Targeted Member State – derogation from the country-of-origin principle (para. 2 and 3)</p> <p>[NL] Policy rule of the Media Authority on recent European, independent media offerings, originally Dutch-language or Frisian-language programmes and programmes that are provided with subtitling for people with a hearing impairment - Art.3.29e</p> <p>The financial obligation of 4,5% investment based on an annual turnover generated in the country will also apply to providers under the jurisdiction of another EU member state for VODs content that is “wholly or partly aimed” at the public in the Netherlands. This includes turnover from: a. advertising messages; b. subscriptions; c. user transactions; d. sponsorship; and e. product placement</p> <p>Article 13 - Low turnover/audience exemption (para. 6)</p> <p>[NL] Policy rule of the Media Authority on recent European, independent media offerings, originally Dutch-language or Frisian-language programmes and programmes that are provided with subtitling for people with a hearing impairment - Art. 8 and 10 – verbatim to that of the revised AVMSD + determining criteria are taken from the revised European Guidelines on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover (below 2 million turnovers for defining low turnover and below 1% of the presumed number of potential users. Media service providers should file an exemption note to the NRA.</p>	

Increased obligations to promote European works for on-demand services		Comments
Policy objectives	<p>Member State 2: Denmark in-depth analyses and relevance to Serbia</p> <p>Article 13 - inclusion of 30% of European works alongside prominence obligation for VODs (para.1)</p> <p>[DK] Order No 1159 of 18 June 2020 - Order on registration-based programme activities - Art. § 14. (1) - verbatim to that of the revised AVMSD;</p> <p>Article 13 Financial contribution requirements for VODs (para.2)</p> <p>[DK] Media agreement for 2019 - 2023 - P. 7</p> <p>VODs are required to invest 2% of their turnover in Denmark in the form of direct investment in new Danish-language content. The details of the scheme and its implementation will be agreed in autumn 2018 between the political parties behind "The Media Agreement 2019-2023".</p> <p>Article 13 Targeted Member State – derogation from country-of-origin principle (para. 2 and 3)</p> <p>[DK] Media agreement for 2019 - 2023 - P. 7</p> <p>The 2% direct investment obligation will apply to all streaming services on the Danish market, including foreign services targeting Denmark.</p> <p>Article 13 Low turnover/audience exemption 6).</p> <p>A threshold is set so that companies with a turnover of less than around 50 million euros in Denmark are exempt from the obligation.</p>	<p>Quota and prominence requirements verbatim to that of the revised AVMSD.</p> <p>Requirement of 2% annual turnover of direct investment for all VOD established in Denmark, including those targeting audiences in the country.</p> <p>Low turnover below 50 million euros – exempted from investment.</p> <p>Future political agreement on the investment stipulated in the Law.</p>

Increased obligations to promote European works for on-demand services		Comments
Policy objectives	<p>Member State 3: Croatia (HR) - in-depth analyses and relevance to Serbia</p> <p>Article 13 - Inclusion of 30% of European works alongside prominence obligation for VODs (para.1)</p> <p>[HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 27 (1) and (3) - verbatim to that of the revised AVMSD;</p> <p>Article 13 - Financial contribution requirements for VODs (para.2)</p> <p>[HR] Law on Audiovisual Activities - consolidated version 19 July 2019 - Art. 25 (1) - VODs are required to invest 2% of their annual turnover for the implementation of National Programme for promotion of audiovisual creativity;</p> <p>[HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 27 (2) and (3), 28 (1) and (2), 48 (8) and 51 (1) to (4) - VODs shall invest 2% of their total annual gross revenue in the production of Croatian audiovisual works by independent producers <i>or</i> purchase Croatian audiovisual works produced by independent producers</p>	

Increased obligations to promote European works for on-demand services		Comments
<p>Policy objectives</p>	<p>VODs targeting audiences in Croatia established in another Member State need to invest in the National Programme for the Promotion of Audiovisual Creativity <i>and</i> invest 2% of their total annual gross revenue in the production of Croatian audiovisual works by independent producers or purchase Croatian audiovisual works produced by independent producers. The financial contribution may be accumulated over 2 years (Art.28).</p> <p>Further quota rules to ensure a sufficient share of European and Croatian works are laid down in the Rulebook on the criteria and method of increasing the scope of the share of European audiovisual works by independent producers - Art. 5, 7 to 9 (Pravilnik o kriterijima i načinu povećanja opsega udjela europskih audiovizualnih djela neovisnih proizvođača - Art. 5, 7 to 9);</p> <p>The calculation of the financial contributions for VODs targeting audiences in Croatia (Article 13(2)) follows the wording of the revised AVMSD ( Art. 28 (3) and (4));</p> <p>Article 13 - Low turnover/audience exemption 6 [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 27 (4), 28 (5) and 51 (5) – verbatim to that of the revised AVMSD and aligned with the European Commission Guidelines on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover.</p>	<p>Share of 30% of European works for VODs alongside prominence obligation;</p> <p>VODs established in HR:</p> <ul style="list-style-type: none"> <li>- invest 2% of their annual turnover in the National Fund for AV works <i>and</i></li> <li>- invest 2% of their total annual gross revenue in the production of Croatian audiovisual <i>or</i></li> <li>- purchase the Croatian audiovisual works produced by independent producers;</li> </ul> <p>VODs ‘targeting’ audience in CRO:</p> <ul style="list-style-type: none"> <li>- invest 2% of their total annual gross revenue in the production of Croatian audiovisual works by independent producers <i>and</i></li> <li>- purchase Croatian audiovisual works produced by independent producers.</li> </ul>



Increased obligations to promote European works for on-demand services		Comments
Policy objectives		
Proposed regulatory interventions and implementation measures	<p>NL</p> <ul style="list-style-type: none"> <li>- Provisions concerning the share of European works contain a rule for the calculation of 30% share and prominence requirements;</li> <li>- VODs established in the NL and those targeting whole or partial audiences in the country are subject to 4,5% direct investment. In addition, VODs under the NL jurisdiction can also invest through rights acquisition and acquisition of licences for works no older than four years;</li> </ul> <p>DK</p> <ul style="list-style-type: none"> <li>- The 2% direct investment obligation will apply to all streaming services on the Danish market, including foreign services targeting Denmark;</li> <li>- Further rules will be laid down in a separate policy tool “The Media Agreement 2019-2023”;</li> </ul> <p>HR</p> <ul style="list-style-type: none"> <li>- VODs established in the country can opt between direct investment in the Croatian audiovisual works or rights acquisition but are in parallel subject to 2% of annual turnover to National Fund;</li> <li>- VODs targeting audiences in the country required to invest 2% of direct investments in the Croatian audiovisual works and rights acquisition.</li> </ul>	

## Conclusions and recommendations

The promotion and distribution of European works have been regulated since the first version of the TVTF Directive and remained unchanged concerning obligations for the linear service providers in the revised AVMSD. According to Article 16, broadcasters should reserve the majority proportion of their transmission time for European works and at least 10% of their programming budget or transmission time for European works (Article 17). Given the identical material scope of these provisions, “the majority of Member States did not foresee any significant substantive reforms affecting the promotion obligations for broadcasters but stuck to the frameworks they had developed in the past by exercising their margin for action in this field” (European Parliament, 2022: 31).

However, the regulatory landscape for VODs has significantly changed from general obligations to much stricter promotional and investment rules. As not all countries have transposed the revised

AVMSD, it is hard to draw a complete and comparable picture of divergent countries' approaches. At this moment, current approaches range from “*merely established in connection with film to which also on-demand service providers would have to contribute to an actual adoption in the national law of the general formulation of the AVMSD (as was done by most MSs) or concrete rules with specific quotas of European works also for on-demand services, in that case via a share in the catalogue*” (European Parliament, 2022: 31) (emphasis added). Concerning quotas, the majority of MSs adopted a 30% rule in line with the revised AVMSD, which is also clear from this country analysis that shows that all three countries - the Netherlands, Denmark and Croatia imposed the same quota system. Currently, there are only a few countries like Austria (above 50% for VODs of public service providers) and France (60%) that imposed stricter rules. Similarly, prominence rules follow the wording of the revised AVMSD - like in the Netherlands that transposed verbatim the monitoring and assessing measures from Recital 35 whereas several countries introduced additional rules on how to “achieve” prominence (Croatia, Bulgaria) (ibid.:33).

The transposition of rules concerning financial obligations varies hugely between the countries and it is hard to draw a general conclusion – also clear from analyses of the provisions in the Netherlands, Denmark and Croatia. All three countries require the VODs under their jurisdiction to directly invest either in national film funds like in the case of Croatia or support domestic film production (the Netherlands and Denmark). This finding is in line with a general trend as about a third of MSs impose direct investment requirements (ibid.:38). Direct investment obligations range from 1,4% to 5,15% of annual turnover (ibid.), specifically 4,5% in the Netherlands and 2% in Denmark and Croatia. However, our analysis indicates that Croatia also imposed additional (not alternative) obligation for VODs established in their territory to purchase the Croatian audiovisual works produced by independent producers whereas, in the Netherlands, the right acquisition is proposed as an alternative to direct investment. On the other hand, Denmark did not impose this obligation and the details of the scheme for direct investment and its implementation will be agreed upon between the political parties behind “The Media Agreement 2019-2023.”

All the surveyed countries also include an exception from financial obligations for low turnover and low audience VODs - both domestic and ‘targeting’ audience in another country– that are in the case of the Netherlands and Croatia similar to those proposed in the European Commission Guidelines on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover and in Denmark a threshold for exemption is set on around 50 million euros.

The legal reasoning for introducing the possibility of extending financial obligations to cross-border situations – and thus, derogate from the country of origin principle – was mainly to enable MSs

to impose obligations on VODs that dominate the market and are located in a few MSs. According to our analysis, all three countries have incorporated this derogatory provision in their legislation and interestingly imposed the same financial contributions scheme as for the domestic VODs. In particular, the Netherlands (which is also home to Netflix, Amazon and Disney) requires VODs targeting audiences in the country to directly invest 4,5% of their annual turnover in the Dutch audiovisual sector. In the case of Croatia, the Law requires VOD service providers targeting audiences in Croatia to invest 2% in the Croatian audio-video centre (the only imposed requirement in Denmark) and 2% direct investment (or acquisition of) Croatian works by independent producers, based on their annual turnover in Croatia. The levy obligation is equal to those required from domestic VODs, and direct investment contribution is not an alternative (to levy) but “an additional obligation *only* for foreign VODs” that can be accumulated over two years (see for an extensive discussion: Kerševan Smokvina, 2021: 478). However, it is unclear how to ensure the enforcement of the ‘Netflix tax’ as the noted Croatian Law lacks explicit guidelines, and the Croatian audio-video centre is tasked to address this complex issue (Ibid.: 474).

Concerning proportionality for calculating the financial investment “Member States of establishment [need] to take into account any financial contributions (additionally) imposed by the targeted Member States, if and when imposing a financial contribution on its domestic providers. In contrast, targeted MSs *do not have to take into account* obligations (already existing in parallel) in other targeted MSs within the framework of proportionality but are limited by being allowed only to base the obligation on the revenues the provider earns in that Member State” (European Parliament, 2022: 37) (emphasis added) and respect the limitations set out in Art. 13(2), (3) and (6) by only allowing proportionate and non-discriminatory requirements (ibid).

Against this backdrop, the preferred course of action for the Serbian transposition process is:

- For linear services:
  - Quota and prominence requirements aligned with the revised AVMSD as well as country cultural policy and production objectives;
  - Financial obligations (direct investment in the fund or cultural production and/or right acquisition) should be considered after robust market analysis, if not carried out already, to determine the level of required investment (taking into consideration the market position of broadcasters and country-based VODs) to be in a position set out an effective financial scheme that would support domestic and independent cultural audiovisual production. This analysis should address the interests and positions of a range of stakeholders from different sectors, including independent film producers and other audiovisual creators, paying particular attention to the representation of women and minority groups.

- For on-demand audiovisual service providers:
  - Quota and prominence requirements aligned with the revised AVMSD (a 30% share of European works alongside prominence obligation, similar as in other MSs) as well as the country's cultural policy and production objectives. Criteria for achieving prominence requirements (e.g. separate catalogue, accessible labelling data, search option, see more: Recital 57.) should be decided in agreement with VOD providers established in the country. This initial cooperation is crucial for two reasons. First, to ensure that the proposed measures are effective and feasible for VODs and second, to define monitoring and assessment criteria, in particular concerning transparency and accessibility of labelling data.
  - Concerning financial obligations for VODs established in the country, direct investment within the range between 1,4% to 5,15% of annual turnover is a preferred option and needs to be aligned with national cultural policy goals. It is recommended to, at least in the initial period, offers alternative investment schemes enabling VODs to either invest directly in the national fund (established under the Law on cinematography, Art.13) and/or direct investment in cultural production and//or through rights acquisition. As noted, the type of financial obligation directly impacts who controls the funds and what type of production is incentivised. The effects of these measures should be reviewed in future market surveys that will help elucidate the most appropriate model for Serbia.
  - If the legislature decides to impose measures on the foreign VODs ("targeting audience" in Serbia), they should be mindful of several crucial considerations:
    - determining the "target audience" criteria such as those stipulated in Recital 38 ("advertisement or other promotions specifically aiming at customers in its territory, the main language of the service or the existence of content or commercial communications aimed specifically at the audience in the Member State of reception");
    - deciding on the type (direct investment and/or right acquisition) and the range of the financial contribution (the same as for domestic VODs or lower/higher);
    - determine and lay down enforcement and monitoring mechanisms and above that
      - internal capacities and expertise of the NRA and available models of cooperation with foreign VODs.

These considerations essentially highlight issues that were raised by other MSs that have so far been cautious on imposing obligations to cross-border providers – that is also a recommendation for the legislators in Serbia (European Parliament, 2022: 39). Potentially and in the initial period, Serbia can learn from the Croatian experience and practices that can be applied to the Serbian context in the later stage and after Serbia becomes a Member State of the EU.

One thing is certain, to address a plethora of challenges and obstacles to the promotion distribution of European works for VODs, the cooperation between the MSs and their regulatory authorities will be key in analysing the effects of different obligations imposed on VODs, their impact on the cultural European and domestic production, market position of linear and nonlinear services providers but also to ensure proper enforcement and monitor the proportionality requirement in the application of the cross-border options concerning financial obligations (European Parliament, 2022: 39).

## 6. New rules on advertising for linear audiovisual media service providers

The regulation of commercial communication includes a set of necessary measures ensuring that consumers are protected against the negative impact of advertising like in the case of deception or discrimination (European Audiovisual Observatory, 2022:31). In the same vein, the regulation of advertising content enables consumers to make informed choices about the products and services but it also safeguards media pluralism and editorial independence (Feci and Valcke, forthcoming: 6). All of these objectives are incorporated in the Revised AVMSD as they were also central to the TWTF and later transposed and updated in the Revised AVMSD. The regulation of advertising has been gradually expanded and specific rules imposed to ensure higher levels of consumer protection and a level playing field in the European internal advertising market. In light of the previous revisions, the 2018 revision kept some of the existing advertising rules for the linear services but also, to some extent and in specific cases, relaxed them, and also expanded the scope to incorporate VSPs' audiovisual content and user-generated content (Broughton Micova, forthcoming: 10).

Given the minimum harmonisation nature of audiovisual media regulation that provides the countries with an option to impose more stringent and detailed obligations as those proposed in the Directive, the revised AVMSD does not exhaustively regulate commercial communication, and merely imposes lower limits, providing MSs with a leeway to set the rules that are aligned with their national interests and legal tradition, under the condition that these rules are compatible with the EU law. Minimum harmonisation rules in the context of commercial communication have the potential to result in cross-border disputes, and regulatory fragmentation (Feci and Valcke, forthcoming: 12) and may require guidelines of the CJEU and European Commission in contextualisation and resolution of the problems arising from the divergent application of the norms within the MSs (Ibid.: 1,2).

In essence, the Revised AVMSD lays down two forms of advertising rules for linear and nonlinear media service providers, including a general obligation applicable to all media service providers. It

also lowers the threshold for certain forms of commercial communication and in this way relaxes the overall regulatory framework (Recital 32), most importantly concerning advertising break frequency that is *increased to 20% of the total daily time (6.00-18.00) and 20% prime time (18.00-24.00)* (Article 23). *In all of these cases, the principle of separation of audiovisual editorial and commercial content remains a building block and an important safeguard of media pluralism and independence* (Article 7b). Another significant change is the introduction of rules for advertising content for VSPs that, so far, was only lightly regulated (Ibid.: 6).

## Analyses

The Revised AVMSD introduces an open-ended notion of audiovisual commercial communication defined as images with or without sound designed to promote goods and services of a natural or legal person with an economic goal (Article 1(1)h). More specifically, this definition includes several important elements:

- “the communication consists of images, with or without sound;
- the images have a promotional purpose, directly or indirectly
- the images promote the goods, services or image of a natural or legal person pursuing an economic activity;
- the images accompany, or are included in, a programme or user-generated video;
- the images are shown in return for payment or similar consideration or self-promotional purposes” (European Audiovisual Observatory, 2022:34).

The revised AVMSD addresses different promotional and commercial activities transmitted by media services such as television advertising, teleshopping, sponsorship and product placement. It specifies in Article 20 that – to ensure the integrity of the programmes – advertising should take into account the programme’s natural breaks, duration of the programmes concerned and the rights of the rights holders (Article 20), and by extension, the interruptions of the cinematographic works and news programmes by television advertising and teleshopping can take place **“once for each scheduled period of at least 30 minutes”**, and in the case of children programmes *“once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes.”* Teleshopping is prohibited during children’s programmes and religious services (Article 20). Concerning sponsorship and product placement – which has been regulated less strictly in the Revised AVMSD – the provisions impose transparency requirements for disclosure of this content, in addition to specific measures for the protection of children, especially about unhealthy food and beverages (Articles 10 and 11).

All media service providers concerning all forms of commercial communication are required to comply with a robust framework of Article 9 that lays down the general obligations and their objectives, respectively. These obligations can be roughly grouped into four categories (Feci and Valcke, forthcoming: 5).

1. *The identification principle* seeks to ensure that viewers are clear that they are watching the advertising content so that they are in a position to make informed choices and recognize manipulation and undue influence (Feci and Valcke, forthcoming: 5). According to Article 9(1) (note for VSPs Article 9 should be read in conjunction with Article 28b):

(a) *audiovisual commercial communications shall be **readily recognisable** as such; **surreptitious audiovisual commercial communication** shall be prohibited.* Surreptitious messages are further explained in Article 1(1)(j) as representations of words or pictures of goods, services, names, or trademarks in programmes “when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature.” In practice, surreptitious messages are best described as “fake” and deceptive commercial communication with a misleading notion.

(b) *audiovisual commercial communications shall **not use subliminal techniques*** (emphasis added). Subliminal techniques are commercial manipulation techniques designed to “circumvent users’ awareness” (European Audiovisual Observatory, 2022: 33).

2. *Protection of human dignity and public health* sets forth several obligations to all media service providers in the interest of protecting equality and human dignity (Feci and Valcke, forthcoming: 5). Under Article 9(1)c, audiovisual commercial communication should not:

*i. prejudice but **respect for human dignity**;*

*ii. include or promote **any discrimination** based on sex, racial or ethnic origin, iii.*

*iii. nationality, religion or belief, disability, age or sexual orientation;*

*iv. **encourage behaviour prejudicial to health or safety**;*

*v. encourage behaviour grossly prejudicial to the **protection of the environment***” (emphasis added).

In addition, advertising for cigarettes and tobacco products will be prohibited, whereas commercial communication of alcoholic beverages should not target minors and encourage “*immoderate consumption of such products*” (Article 9(1)e). Additional guidelines for television advertising and teleshopping for alcoholic beverages are laid out in Article 22, specifying that such commercial communication should not be aimed at minors or depict minors consuming these beverages nor it shall

promote and link these beverages with certain abilities, like enchanted physical conditions or therapeutic qualities. Finally, “*medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited*” (Article 9(1)(f)).

3. Principles concerning the *protection of minors* provide specific measures to protect children that are exposed to technology and audiovisual services from an early age and are most likely to fall prey and be influenced by this content (Feci and Valcke, forthcoming: 5,6, see also Chapter 3 – Protection of minors against harmful content online, including strengthening protection on video-on-demand services). For this reason, the revised AVMSD prohibits any advertising content that can cause any direct or indirect mental, physical and moral harm to minors nor they could be deceptive to exploit “*their **inexperience or credulity**, directly encourage them to **persuade their parents** or others to purchase the goods or services being advertised, **exploit the special trust minors place in parents**, teachers or other persons, or **unreasonably show minors in dangerous situations***” (Article 9(1)(g)) (emphasis added).

The revised AVMSD expanded the protection of minors principle, thus requiring media service providers, that as in addition to the existing obligations, develop self- and co-regulatory mechanisms concerning the advertising of unhealthy food and beverages in and during children’s programmes to completely reduce children’s exposure to such commercial content (Article 9(4); see also: European Audiovisual Observatory, 2022: 36, see also chapter 7 – Strengthened provisions to protect children from inappropriate audiovisual commercial communications).

4. *Protection of editorial responsibility and independence* provides a set of relevant safeguards for freedom of expression and media freedom (Feci and Valcke, forthcoming: 6), ensuring that shaping of public opinions and the ability of media services to inform the public completely and in a great variety:

*“editorial decisions **remain free from any state interference or influence by national regulatory authorities or bodies that goes beyond the mere implementation of law and which does not serve to safeguard a legally protected right which is to be protected regardless of a particular opinion**” (Recital 54) (emphasis added).*

Article 1(1)b) provides more clarity on the editorial decisions defined as decisions made regularly, as a part of exercising editorial responsibility, relating to the daily operation of the audiovisual media service. Whereas editorial responsibility implies “*effective **control both over the selection of the programmes and over their organisation** either in a chronological schedule, in the case of television*



*broadcasts, or a catalogue, in the case of on-demand audiovisual media services*” (Art.1(1)c) (emphasis added). The independence and protection of editorial responsibility are further strengthened in several different provisions. Television advertising and teleshopping should be “*recognisable and distinguishable from editorial content*” (Article 19(1)). In the case of sponsorship and product placement, their content and organisation within the programme should not influence effective control of and affect the responsibility and editorial independence (Article 10(1)a and Article 11(3)). Moreover, considering that sponsorship and product placement often makes it difficult for viewers to distinguish audiovisual editorial content from commercial communication, this content “shall not be included in news and current affairs programmes, nor in consumer affairs programmes where viewers expect a genuine and honest review.” (Ibid.: 6).

As noted previously, VSPs under this revised AVMSD are subject to regulation in the field of commercial communication. The Directive’s scope was expanded to also include user-generated content. Most of the rules enshrined in Article 9(1), described in detail in the previous paragraphs, are fully applicable to VSPs and UGC. Read in conjunction with Articles 28a and 28b, the revised AVMSD requires VSP services to put in place measures to:

- protect minors from programmes and videos, including commercial communication that may harm their physical, mental and moral development.
- protect the general public from programs, videos and commercial communication containing incitement to violence or hatred against the protected discriminatory ground and protected characteristics, enlisted in the European Charter of human rights (for more information see: Article 21 of the Charter).
- protect the general public from content and commercial communication containing the content distribution of any activity that is deemed a criminal act under European law, such as terrorist offence, child pornography offences and offences concerning racism and xenophobia (Article 28b(1)).

However, Article 9(1) in conjunction with Article 28b s are applicable *only* when commercial communications are *marketed, sold or organised by the VSP provider itself* (e.g., pre-, mid- and post-rolls accompanying YouTube videos). In the second situation, i.e., for audiovisual commercial communication *not marketed, sold or organised by VSP providers* (e.g. influencer advertising), their responsibility is limited to the rules listed under Article 9(1) due to the limited control of these platforms over commercial content distributed by third parties (Ibid.: 6). They are also required to inform the users that the program contains commercial content upon a condition that upload functionality for their users include features enabling them to mark such content.

The appropriate measures applied by VSPs for commercial communication not marked, sold or organised by them, shall be practicable and proportionate, *“taking into account the size of the video-sharing platform service and the nature of the service that is provided”*, such as, for example, including in terms and conditions requirements set out in Article 9(1). The appropriate measures for VSPs that have control over the commercial content distributed on their platforms, the list is more detailed and include: applying terms and conditions about specific protective measures, enabling upload marking functionality for users, establishing reporting and flagging mechanism, that is to say, redress mechanism for out-of-court dispute resolutions and/or establishing age verification systems for minors and parental control options, including provision of effective media literacy and awareness raising tools (Article 28(b)3) (note: these measures all applicable to all audiovisual content, including commercial communication, discussed in details in Chapter 3 – Protection of minors against harmful content in including strengthening protection on video-on-demand services).

In practice, VSPs “are left with a wide margin of discretion in light of commercial communication not marketed, sold nor organised by them” as there are no specific rules, for instance, on product placement and sponsorship like in the case of “influencer advertising<sup>28</sup>” that heavily relies on commercial content, often in combination with media content, for their economic gain (Ibid.: 6, 10). It is important to note that the proposed and adopted measures should not lead to *“any ex-ante control measures or upload-filtering of content which do not comply with Article 15 of Directive 2000/31/EC”* (Article 28b (3)(2)). Finally, like in the context of nonlinear services, the revised AVMSD proposes self- and co-regulatory mechanisms to ensure a higher level of protection against unhealthy food and beverages of children from commercial content.

## A brief overview of the relevant articles of Revised AVMSD

Due to the increased pressure on broadcasters to adjust and respond to the transnational proliferation of VOD and VSP services that have almost entirely overtaken advertising revenues (Broughton Micova, forthcoming: 11), the revised AVMSD recognizes *“a need for more flexibility about audiovisual commercial communications, in particular for quantitative rules for linear audiovisual media services and product placement”* (Recital 32). At the same time, it introduced a set of requirements for the VSP services for television advertising and teleshopping, but the rules on product placement and sponsorship (Articles 10 and 11) do not apply to VSP services (European Audiovisual Observatory, 2022:42). Specific requirements for promotion of alcoholic beverages and prohibition of commercial

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28 This form of advertising can be briefly described as “i.e., advertising by influential user-generated content creators on online (video-sharing) platforms that seamlessly integrates the promotion of products or services into editorial content” (Feci and Valcke, forthcoming: 7).

content for cigarettes and similar products have been maintained in all the revisions.

The most relevant change considers the time limits (ad breaks) on television advertising that were increased from 15% daily under TWFD to 20% in an hour, further loosened after the 2007 revision. The revised AVMSD increased to 20% of the total daily time (6.00-18.00) and 20% prime time (18.00-24.00) (Article 23; Broughton Micova, forthcoming: 12). However, the revised AVMSD maintained certain limitations for ad-breaks to safeguard the integrity of the programme. Thus, ad breaks can only take place during the natural breaks of the programme, and in particular:

*“The transmission of **films made for television** (excluding series, serials and documentaries), cinematographic works and news programmes may be **interrupted by television advertising, teleshopping, or both, once for each scheduled period of at least 30 minutes.** The transmission of **children’s programmes** may be interrupted by television advertising once **for each scheduled period of at least 30 minutes**, provided that the scheduled duration of the programme is greater than 30 minutes. **The transmission of teleshopping shall be prohibited during children’s programmes.** No television advertising or teleshopping shall be inserted during religious services” (Article 20(2)) (emphasis added).*

The Directive recognizes several forms of commercial communication content: television advertising, teleshopping, sponsorship and product placement. Television advertising (Article 1(1)) means any time of advertising - including self-promotion – broadcasted or streamed between programmes or during breaks whereas teleshopping means direct offers to the public good and services with an intention of immediate contractual closing that can be in the form of spots, windows and entire channels. The ad breaks are limited to:

*“The proportion of television advertising spots and teleshopping spots within the period **between 6.00 and 18.00 shall not exceed 20 % of that period.** The proportion of television advertising spots and teleshopping spots within **the period between 18.00 and 24.00 shall not exceed 20 % of that period**” (Article 23(1)).*

The legal reasoning behind this provision can be found in Recital 41 which seeks to offer broadcasters more flexibility to decide when to place advertising to maximise advertisers’ demand and flow but also to ensure consumer protection as “such flexibility could expose viewers to an excessive amount of advertising during prime time. Specific limits should therefore apply within the period from 6.00 to 18.00 and from 18.00 to 24.00.” Article 23 does not apply to the broadcaster’s announcements in connection to their programs, sponsorship announcement, product placements or “neutral frames between editorial content and television advertising or teleshopping spots, and between individual spots” (para.2)

Article 24 specifies that “**teleshopping** windows shall be identified as such by optical and acoustic means and shall be of a minimum uninterrupted **duration of 15 minutes**” (emphasis added).

Sponsorship (Article (1)k) refers to contributions made by public or private entities that are not connected to the broadcaster or VOD service that seek to promote their name, mark, image, activities and products. Importantly, sponsorships are different from television advertising in that they do not incite consumption (Feci and Valcke, forthcoming: 5). Further requirements are provided in Article 10 that prohibit sponsored content that influences or affects editorial responsibility and independence. In addition, this content shall not directly encourage the purchase or rental of goods or services (as it would then classify as teleshopping). Sponsors are responsible to display and inform viewers of the existence of the sponsor agreement by clearly identifying content with the name, logo, or any other symbol of the sponsors throughout the whole duration of the programme (Article 10).

Finally, product placement (Article 1(1)m) refers to the inclusion of or a reference to a product, service or trade mark in the programmer, user-generated video in return for payment (Ibid.: 2-4). Product placement is allowed in all audiovisual media services “*except in news and current affairs programmes, consumer affairs programmes, religious programmes and children’s programmes,*” under the following conditions, similar to those stipulated concerning sponsorship:

- a. the content should not influence or affect the editorial responsibility and independence,
- b. this content should not encourage the purchase or rental of these goods and services
- c. it shall not give “undue prominence of these goods”,
- d. viewers should be informed of the existence of product placement to avoid misleading and confusion of the viewers (Article 11(1)).

However, MSs can choose to waive this requirement, except for the programmes produced or commissioned by a service media provider or an affiliated company. It is prohibited that product placement contains product placement for cigarettes and similar products (Article 11).

The application of these rules is left to the discretion of MSs, but the revised AVMSD encourages additional use of self- and co-regulation, though, for example, codes of conduct, in particular for inappropriate audiovisual commercial communication for alcoholic beverages, or foods and beverages with harmful nutritional and physiological effects (Article 9(4)), especially in the context of protection of children (Article 9(5) See more: chapter 7 – Strengthened provisions to protect children from inappropriate audiovisual commercial communications ).

All of these forms of commercial communication, except for product placement, were similarly defined and regulated in previous revisions. However, the revised AVMSD, under certain conditions and limitations, allows product placement – initially banned, but then introduced in the 2007/2010 AVMSD. By allowing product placement, the broadcasters in Europe gained the opportunity to generate additional income in an attempt to level the playing field between linear and nonlinear service providers (Broughton Micova, forthcoming: 11). In addition, *all* audiovisual services must meet the advertising limits set by the revised AVMSD, which represents another important mechanism to ensure a balanced competition of audiovisual media service providers (Broughton Micova, 2021: 11). *A clear separation of advertising content and editorial independence remains an important standard that guarantees programme integrity, consumer protection and media freedom (Recital 54)*. It is a completely different set of questions about how this levelling exercise and relaxation of rules on commercial communication for broadcasters will play out in reality given the minimum harmonisation nature of the AVMSD and also the ever-expanding nature of VPS service providers, in particular Google (which also owns YouTube), Facebook and other tech giants.

## Country case analyses

Audiovisual commercial communication is an umbrella term that covers various forms of promotion of goods and services. The Revised AVMSD kept the same scope covering television advertising, teleshopping, sponsorship and product placement. The rules and limitations proposed in the Revised AVMSD, in particular, Article 9 set tighter rules for television advertising and teleshopping for all media service providers concerning presentation quantity and frequency as well as insertion – safeguarding editorial independence and integrity of the programme (Recital 25 and Recital 54, European Commission). The most relevant novelty concerns the extension of ad breaks that can take up to 20% of any given hour of broadcasting, preferably inserted between the programmes and not interfering with its integrity and editorial independence (Article 20). Rules on sponsorship have remained the same (European Audiovisual Observatory, 2022: 39) whereas the rules on product placement are relaxed to some extent, though the prohibition of product placement in news, children and religious programmes remains (*ibid.*).

Against the background of this recap, the following country analysis looks at the provisions on commercial communication for linear services listed under Article 9 and in particular seeks to offer guidance to legislators in Serbia on countries' transposition of rules that, to some extent, relaxed the rule for broadcasters. Other relevant provisions concerning certain limitations of commercial communication, especially in the context of the protection of minors are extensively discussed and presented in Table 4: Protection of minors against harmful content online, including strengthening provisions for on-demand services (see: Chapter 3) and in Table 9: Strengthening provisions to protect children from inappropriate commercial communication (see: Chapter 7).

Due to the limited availability of the transposition data and reports about the 2018 AVMSD, the selection of countries is based on the analysis of a report published in 2017 by the European Audiovisual Observatory that looked at the transposition practices of commercial communication rules of the 2010 AVMSD (European Audiovisual Observatory, 2017). According to the report, most of the countries have transposed almost verbatim commercial communication rules whereas some countries like France introduced stricter rules or introduced obligations that apply to linear and on-demand providers like Hungary and Croatia that, for instance, imposed tighter requirements for children programmes (ibid.: 65-67) and both countries also share geographical and cultural proximity to Serbia. For this report, the focus will be on these three countries as their regulatory approaches provide a variety of perspectives concerning rules on commercial communication.

**Table 8: New rules on advertising for linear audiovisual media service providers - Overview**

New rules on advertising for linear audiovisual media service providers		Comments
Policy objectives	<p>Recital 25 - protection of the editorial responsibility and integrity of programmes;</p> <p>Recital 54 - protection of editorial independence against undue influence and interference of regulators and other state bodies;</p> <p>Recital 32. - relaxation of the rules on commercial communication for linear services, in particular, quantitative rules and product placement;</p> <p>Recital 33 - relaxation of rules for product placement.</p> <p>Recital 41 - balancing of consumer protection and broadcasters' maximisation of advertising profit. Specific time limits for advertising.</p>	<p>Safeguarding editorial independence and programme integrity from advertising content and marketing industry influence;</p> <p>Relaxation of rules for product placement and increased ad-breaks limits.</p>
Relevant Revised AVMSD provisions (numbering according to the Consolidated version of the AVMSD) - see for reference the Excel AVMSD Tracking Table	<p>Article 1(bb) - definition of editorial decision;</p> <p>Article 1 (c) - definition of editorial responsibility</p> <p>Article 9 (1)(a)(b)(c)- prohibited advertising content; (d)-prohibition in relation to advertising for cigarettes and similar products.</p> <p>Article 10 - rules on sponsorship;</p> <p>Article 11 - product placement;</p> <p>Article 19(1) - identification rules;</p> <p>Article 20 - the integrity of the programme;</p> <p>Article 23 - proportion rules for television advertising and teleshopping;</p> <p>Article 24 - time limitation for teleshopping.</p>	<p>Introduces advertising limits concerning the presentation, quantity, frequency and insertion – safeguarding editorial independence and integrity of the programme.</p>
Relevant provisions of the Law on Electronic Media and/or the Law on Advertising	<p>Law on advertising (Article 28-30a - product placement, Article 31-37 - television and teleshopping rules and limitations, Article 50-53 - advertising for cigarettes and similar products, Article 64 - 69 sponsorship)</p>	

New rules on advertising for linear audiovisual media service providers	Comments	
<p>Transposition of the 2018 revision of the AVMSD in selected EU Member States</p>	<p>Member State 1: France in-depth analyses and relevance to Serbia</p> <p>Article 1(bb) - definition of editorial decision No article;</p> <p>Article 1 (c) - definition of editorial responsibility No article;</p> <p>Article 9 (1)(a)(b)(c)- prohibited advertising content; (d)-prohibition in relation to advertising for cigarettes and similar products.</p> <p>[FR] Decree No. 2021-793 of 22 June 2021 on on-demand audiovisual media services - Consolidated 5 May 2022 Art. 30 and 31 Specify that rules on advertising messages and teleshopping are applicable to on-demand services;</p> <p>Article 10 - rules on sponsorship [FR] Decree n°92-280 of 27 March 1992 taken for the application of Articles 27 and 33 of the law n° 86-1067 of 30 September 1986 and fixing the general principles defining the obligations of service publishers with regard to advertising, sponsorship and teleshopping - Consolidated 5 May 2022 - Art. 18 – verbatim to that of the revised AVMSD;</p> <p>Article 11 - product placement [FR] Law No. 86-1067 of 30 September 1986 on the freedom of communication (Loi Léotard) - Consolidated 18 August 2022 - Art. 14-1 paragraph 1 The Audiovisual and Digital Communication Regulatory Authority will set out the conditions under which programmes of audiovisual communication services, with the exception, in particular, of news and current affairs programmes, consumer programmes, religious programmes and children's programmes, may include product placement. The guidelines for National Regulatory Authority are verbatim to that of the AVMSD (para.2);</p> <p>Article 19(1) - identification rules; [FR] Decree No. 2021-793 of 22 June 2021 on on-demand audiovisual media services - Consolidated 5 May 2022 - Art. 31 Specifies that the rules are applicable on on-demand services;</p> <p>Article 20 - the integrity of the programme; [FR] Decree n°92-280 of 27 March 1992 taken for the application of Articles 27 and 33 of the law n° 86-1067 of 30 September 1986 and fixing the general principles defining the obligations of service publishers concerning advertising, sponsorship and teleshopping - Consolidated 5 May 2022 - Art. 15 verbatim to that of the revised AVMSD + for the insertion of the advertisement during programmes – a period of 20 minutes should elapse between each successive break within the programme;</p>	<p>The Regulatory Authority will specify conditions under which product placement is allowed. It is prohibited in news and affairs programmes, religious and children programmes.</p> <p>Special Law that applies to on-demand services (Decree No. 2021-793 of 22 June 2021)</p> <p>For advertising content that is inserted during programmes – a period of 20 minutes should elapse between each successive break within the programme</p> <p>For cinematographic works - advertising cannot last longer than 6 minutes.</p>



New rules on advertising for linear audiovisual media service providers	Comments
<p>When the news, current affairs programmes, documentaries, and children programmes last less than 30 minutes, they shall not be interrupted with advertisement. For longer programmes, they should ensure program integrity and a 20 minutes elapsed period applies. For cinematographic works - advertising cannot last longer than 6 minutes. (Art.15). No advertisement on religious programmes (Art.16).</p> <p>Article 23 - proportion rules for television advertising and teleshopping</p> <p>[FR] Decree n°92-280 of 27 March 1992 taken for the application of Articles 27 and 33 of the law n° 86-1067 of 30 September 1986 and fixing the general principles defining the obligations of service publishers concerning advertising, sponsorship and teleshopping - Consolidated 5 May 2022 - Art. 15 V</p> <p>The allocated time for advertisement is selected based on the population size in the geographical area. For areas with ten million inhabitants – it shall not exceed 9 minutes per hour or 12 minutes in a given clock hour. For various other types of broadcasters – the limit is 12 minutes in a given clock hour.</p> <p>Article 23(2) - no article;</p> <p>Article 24 - time limitation for teleshopping</p> <p>[FR] Decree n°92-280 of 27 March 1992 taken for the application of Articles 27 and 33 of the law n° 86-1067 of 30 September 1986 and fixing the general principles defining the obligations of service publishers concerning advertising, sponsorship and teleshopping - Consolidated 5 May 2022 - Art. 23, 28 and 29 – verbatim to that of the revised AVMSD + teleshopping may not last for more than 3 hours per day and can only be made available via terrestrial radio between midnight and 11 a.m. and between 2 p.m. and 4 p.m.</p>	<p>No advertising for news, consumer affairs, children's programmes and documentaries that have scheduled duration for less than 30 minutes. No advertising during religious services.</p> <p>With some differentiation between various types of broadcasters and the population size of the geographical areas, the maximum allowed time for advertisement is 12 minutes a given clock hour.</p> <p>Stricter rules for the duration of teleshopping - max 3 hours a day. For terrestrial broadcasters, the Law specifies advertising time.</p>



New rules on advertising for linear audiovisual media service providers	Comments
<p>Member State 2: Hungary in-depth analyses and relevance to Serbia</p> <p>Article 1(bb) - definition of editorial decision                      [HU] Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content – Consolidated 8 August 2019 - Art. 1. § 11a. - verbatim to that of the revised AVMSD + editorial decision means selecting the content of the media service and determining how it is organised;</p> <p>Article 1 (c) - definition of editorial responsibility                      [HU] Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content – Consolidated 8 August 2019 - Art. 1. § 2. - verbatim to that of the revised AVMSD;</p> <p>Article 9 (1)(a)(b)(c)- prohibited advertising content; (d)-prohibition in relation to advertising for cigarettes and similar products.                      [HU] Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content – Consolidated 8 August 2019 - Art. 20. § (1)-(3) - verbatim to that of the revised AVMSD. Commercial communication cannot be presented in media content that offends religious or ideological convictions (para.5);</p> <p>Article 10 - rules on sponsorship                      [HU] Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content – Consolidated 8 August 2019 - Art. 20. § (8)-(10) - verbatim to that of the AVMSD;</p>	

New rules on advertising for linear audiovisual media service providers	Comments
<p>Article 11 - product placement;                      [HU] Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 juin 2021 - Art. 30. – verbatim to that of the revised AVMSD + include reference to VODs;</p> <p>Article 19(1) - identification rules                      [HU] Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 June 2021 - Art. 33. § (1) a) b) – verbatim to that of the AVMSD, specifies that it refers only to linear services;</p> <p>Article 20 - the integrity of the programme                      [HU] Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 June 2021 - Art. 33. § (2) - verbatim to that of the revised;</p> <p>A cinematographic works, news, and political programmes whose duration exceeds 30 minutes broadcasted may be interrupted once every 30 minutes - except for television series and documentaries. For programmes targeting minors under the age of fourteen – the same 30 minutes rule is applicable. Advertising is prohibited in news programmes that last less than 30 minutes, reports on events of national holidays and religious services. (Art.34 and Art.33);</p> <p>Article 23 - proportion rules for television advertising and teleshopping                      [HU] Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 juin 2021 - Art. 35. - verbatim to that of the AVMSD + applicable to split-screen advertising, virtual advertising;</p> <p>Article 24 - time limitation for teleshopping                      [HU] Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 juin 2021 - Art. 33. § (1) b); 203. § 66 - verbatim to that of the AVMSD.</p>	<p>Includes definition of an editorial decision and editorial responsibility - verbatim to the revised AVMSD.</p> <p>For broadcasters, cinematographic works, news, and political programmes whose duration exceeds 30 minutes their programme may be interrupted once every 30 minutes - except for television series and documentaries. For programmes targeting minors under the age of fourteen – the same 30 minutes rule is applicable.</p> <p>Advertising is prohibited in news programmes that last less than 30 minutes, reports on events of national holidays and religious services. (Art.34 and Art.33)</p> <p>Portions of the ad breaks same as in the revised AVMSD and applicable to split-screen advertising and virtual advertising;</p>

New rules on advertising for linear audiovisual media service providers	Comments
<p>Member State 3: Croatia in-depth analyses and relevance to Serbia</p> <p>Article 1(bb) - definition of editorial decision [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 3 (1) 36.- verbatim to that of the revised AVMSD;</p> <p>Article 1 (c) - definition of editorial responsibility [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 3 (1) 35. - verbatim to that of the revised AVMSD;</p> <p>Article 9 (1)(a)(b)(c)- prohibited advertising content; (d)-prohibition in relation to advertising for cigarettes and similar products [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 21 (1) and (2) - verbatim to that of the revised AVMSD;</p> <p>Article 10 - rules on sponsorship [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 22 - verbatim to that of the revised AVMSD;</p> <p>Article 11 - product placement [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 23 - verbatim to that of the revised AVMD - verbatim to that of the revised AVMSD;</p> <p>Article 19(1) - identification rules [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 33 (1)- verbatim to that of the revised AVMSD;</p> <p>Article 20 - the integrity of programme [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 36 - verbatim to that of the revised AVMD + teleshopping spots shall not be broadcast 10 minutes before and after a children's programme.</p> <p>Article 23 - proportion rules for television advertising and teleshopping [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 36 - verbatim to that of the revised AVMSD;</p> <p>Article 24 - time limitation for teleshopping [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 40 - verbatim to that of the revised AVMSD.</p>	

New rules on advertising for linear audiovisual media service providers		Comments
<p>Proposed regulatory interventions and implementation measures</p>	<p>FR:</p> <ul style="list-style-type: none"> <li>- National Regulatory Authority responsible to specify requirements for product placement. The law introduces a general framework;</li> <li>- There is a special legal act for on-demand services that are complementary to the audiovisual media law;</li> <li>- Program integrity is ensured by introducing a requirement of 20 minutes elapse between each successive advertising break for programmes longer than 60 minutes. Cinematographic works may be interrupted with a total duration exceeding six minutes;</li> <li>- Maximum advertising time 12 minutes in a given clock hour for various types of broadcasters;</li> <li>- Stricter rules imposed for the duration of teleshopping.</li> </ul> <p>HU</p> <ul style="list-style-type: none"> <li>- Proposes definitions of an editorial decision and editorial responsibility;</li> <li>- Advertising prohibited for news, political affairs programmes, religious services and events on national holidays whose duration is less than 30 minutes.</li> </ul>	

## Conclusions and recommendations

The country analysis indicates that the selected countries mostly transposed provisions of the revised AVMSD verbatim. This practice could signal that their policy objectives - aligned with those of the Directive – seek to increase the level playing field in the marketing sector for linear and non-linear service providers. Even the countries such as France often imposed stricter rules than those proposed in the AVMSD seemed to be loosening the rules on commercial communication, especially concerning television advertising for linear services. Interestingly, the National Regulatory Authority in France is required to specify the rules for product placement. Though VODs are regulated in a separate law, the transposed provisions stipulate that advertising rules are equally applicable to on-demand service, another signal that the French legislature seeks to ensure fair competition between linear and nonlinear service providers. Concerning Hungary and Croatia, their approach is similar to French, with the exception that their audiovisual laws include definitions of an editorial decision and editorial independence as well as the guarantees for program integrity – in line with the revised AVMSD. Similarly, French law provides additional safeguards to program integrity, editorial independence and media pluralism by providing specific time-frames for ad breaks: i. a requirement of 20 minutes elapse between each successive advertising break for programmes lasting longer than 60 minutes; ii. cinematographic works may be interrupted with a total duration not exceeding six minutes; iii. maximum advertising time of 12 minutes in a given clock hour for various types of broadcasters. In a similar vein, Croatia and Hungary introduced the same limitation concerning frequency, proportion rules and time limits as those stipulated in the revised AVMSD.

For all of these reasons, the preferred course of action for the Serbian transposition process is to:

-Introduce measures and obligations for broadcasters and VODs about the protection of editorial independence, program integrity and media pluralism. These provisions should apply to all advertisements and should guarantee editorial independence and program integrity against undue influence and interference of marketing companies and state bodies – in line with the revised AVMSD, in particular Articles 9, 10, 11, 19, 20. The proposed measures should be mindful of balancing exercise of the consumer protection rights, editorial independence and media service providers' advertising profit revenue. They should also seek to level the playing field between linear and nonlinear service providers.

- Identify and specify time limits for advertising - in line with the AVMSD provisions (a 12 minutes rule in a given clock hour). However, additional limitations should be indicated for ad breaks during cinematographic works, news programmes, political affairs, religious services, and children's programmes.

- Rules on sponsorship and product placement should be aligned with the revised AVMSD provisions but the legislators in Serbia can introduce tighter rules for advertising of certain products or during certain programmes, especially concerning gambling, alcoholic beverages and HFSS food advertised to children;
- Ensure consistency with the other relevant provisions contained in various EU Directives: the Unfair Commercial Practices, the Tobacco Advertising Directive, the Directive concerning Medicinal Products for Human Use and the Regulation on Nutrition and Health Claims.

In line with the scope of this chapter, the country analysis did not look at transposition practices concerning VSPs providers whose obligations are discussed in this chapter (see sub-chapters: Analysis and A brief overview of the relevant articles of the Revised AVMSD). However, it is relevant to note that the Law on advertising in Serbia already refers to VSPs' obligations for commercial communication (Article 45), thus further legislative changes and alignments may be required. For further information and legislative discussion, including the county case studies, see: European Audio-visual Observatory, *New actors and risks in online advertising, 2022* (available online and in the reference list).

## Looking ahead

Alongside the advertising revenue generated through commercials sponsored by private entities and companies, state advertising (i.e. public funds used for advertising purposes) is also an important revenue opportunity for broadcasters. According to the proposed EMFA, the allocation of state advertising distorts the internal market and sometimes “favour and covertly subsidise certain media outlets that provide government-friendly views” (Draft EMFA: 2). Similar to the safeguards for the editorial independence and program integrity in the revised AVMSD, the draft EMFA also recognizes that state advertising may make media service providers vulnerable to undue influence and pose a threat to freedom to provide services and other fundamental rights. It also acknowledges that “opaque and biased allocation of state advertising is, therefore, a powerful tool to exert influence or ‘capture’ media service providers” (Recital 48) so “it is necessary to establish common requirements of *transparency, objectivity, proportionality and non-discrimination in the allocation of state advertising and state resources to media service providers to purchase goods or services from them other than state advertising, including the requirement to publish information on the beneficiaries of state advertising expenditure and the amounts spent* (Recital 49) (emphasis added).

The draft EMFA includes a definition of state advertising that refers to:

- placement, publication or dissemination of;
- promotional or self-promotional messages;
- in return for payment or any other consideration;
- by or on behalf of national, regional public authority, regulatory authorities, state-owned enterprises or any local government of a territorial entity of more than 1 million inhabitants (Article 2(5)).

With such a broad notion of ‘state advertising’, the EU legislator has sought to include different state and local authorities, including state-owned enterprises and a variety of promotional messages. The proposal articulates two specific objectives:

- transparency, non-discrimination, proportionality, objectivity and inclusiveness of *audience measurement methodologies, in particular online*;
- transparency, non-discrimination, proportionality and objectivity in the *allocation of state advertising to media outlets*, to minimise the risks of the misuse of public funding for partisan interests, to the detriment of other market players. It will thus promote fair competition in the internal media market.” (Draft EMFA: 3).

The noted objectives are laid down and specified in Article 24 – Allocation of state advertising – that requires MSs to ensure that public funds or “advantage granted by public authorities to media service providers for advertising” (e.g., media subsidies and other budgetary allocations for media service providers) are awarded in transparent, objective, proportionate and non-discriminatory criteria and process (para.1). The same procedural rules and selection criteria should be applicable to purchase goods and services other than state advertising (para.2).

State authorities on all levels, including state-owned enterprises or other state-controlled entities, are obliged to “*make publicly available accurate, comprehensive, intelligible, detailed and yearly information about their advertising expenditure allocated to media service providers [...]*”. This data should contain the legal names of media service providers and the total amount allocated per media service provider (para.2). It is the responsibility of NRAs to monitor the compliance of state authorities with noted obligations and the NRAs may request additional information, including concerning selection criteria (para.3).

The draft EMFA will have a significant role in future media regulation beyond AVMS providers. Specifically, in the context of commercial communication of the media services, the draft EMFA seeks to further level the playing field in the internal market as state advertising is a relevant revenue stream in many countries and for various media services. For this reason, the future application of the EMFA and in particular this provision should be taken into consideration by the legislators in Serbia that should seek to ensure both editorial independence and freedom to provide services but also the fair competition of private and state advertising entities.

## 7. Strengthened provisions to protect children from inappropriate audiovisual commercial communications

The Revised AVMSD lays down a set of general provisions for the protection of minors that apply to all media service providers and all forms of commercial communication. Apart from the general principles set out in Article 9 according to which advertising content shall seek to protect human dignity and encourage behaviour that is not detrimental to the health and safety of minors, Article 28b provides more detailed requirements for VSP services, especially for commercial content that is sold, arranged and organised by them (Art. 28n(9)(1)). The requirements set out in these provisions are mindful of the negative impact of advertising content on minors, especially about advertising content on alcoholic products and foods high in fat, salt and sugar – HFSS).

The studies show that there is now “unequivocal evidence that the market to children of food which are high in fats, salt and sugar has a strong impact on childhood obesity” (Beyland and Tattlow Golden, 2017: 8). Despite this evidence, advertising industry continues to expose children to unhealthy food and beverages (e.g., energy drinks, snack food, confectionery products like chocolates and bars, etc.). With a vision to “*effectively reduce the exposure of children to audiovisual commercial communications regarding foods and beverages that are high in salt, sugars, fat, saturated fats or trans-fatty acids*” (Recital 28), the AVMSD encourages MSs to join their efforts with the advertising industry and use self- and co-regulatory mechanisms to strengthen the protection of children against the promotion of and exposure to HFSS foods. Similarly, it also requires MSs to limit the exposure of children to commercial content for alcoholic beverages (Recital 29). The self- and co-regulatory mechanisms, and codes of conduct are also recognized as important tools to encourage healthy lifestyles and responsible consumption of alcoholic beverages. However, according to some organisations like the European Consumer Organization, the proposed rules are not sufficiently clear and strict and thus the Revised AVMSD can be seen as a missed opportunity to prioritise the protection of children from unhealthy food marketing (Calvert, 2021:5).



## Analysis

The revised AVMSD introduces a set of general rules for commercial communication for all kinds of audiovisual media service providers. In particular, it recognizes four forms of advertising content: television advertising, teleshopping, product placement and sponsorship (see more: Chapter 6. – New rules on advertising for linear audiovisual media service providers). Commercial communication is defined as:

*“Images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity; such images accompany or are included in, a programme or user-generated video in return for payment or similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement” (Article 1(1)(h)).*

Primarily, all service providers are obliged to ensure that their content and commercial communication does not impair physical, mental and moral development (Article 6a(1), see more Chapter 3 – Protection of minors against harmful content online, including strengthening protections on video-on-demand services).

Specifically, regarding the commercial communication content, the revised AVMSD introduces several tiers of restrictions:

1. Prohibition of surreptitious and subliminal advertising content in all instances as their deceptive and manipulative language and images can easily influence and have an adverse impact on the general public, including children (Article 9 (1)(a) and (b)).
2. Prohibition of transmission of commercial content that is prejudicial to human dignity, health and safety, discrimination and environment (c)
3. Prohibition of promotion of cigarettes, tobacco and related products (d)
4. Prohibition of advertising alcoholic beverages aimed at minors and encouraging immoderate consumption (e)
5. Audiovisual commercial communications shall not cause physical, mental or moral “detriment to minors; therefore, they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations” (g).

It should be noted that Recital 26 specifies that rules concerning advertisement for alcoholic beverages laid down in the Directive (Article 9 and Article 22, respectively) should apply to sponsorship and product placement on VOD services. Further rules for on-demand services for VODs are provided in AVMSD 2010/12/EU.

The revised AVMSD expands the scope of Article 9 and introduces a new provision for the protection of children *against commercial communication on unhealthy food and beverages* (HFSS foods), encouraging MSs to develop self and co-regulatory mechanisms and codes of conducts to effectively reduce the exposure of children to advertising for HFSS foods and ensuring that it does not highlight the positive aspects of such food and beverages (para. 4). However, it does not explicitly prohibit advertising content about these products, but merely indicates that codes of conducts and multi-stakeholder agreements should seek to limit the exposure of children to unhealthy foods advertisements. Similarly, concerning alcoholic beverages, the implementation of codes of conduct should help media services and the advertising industry to limit the exposure of minors to advertising of these beverages (para. 3; see also: European Audiovisual Observatory, 2022:38). Finally, there are no specific provisions on the promotion of gambling, and Recital 30 is the only reminder that minors should be effectively protected from advertising content on gambling. It also recognizes the existence of self- and co-regulatory mechanisms at the EU and national level but does not go further to encourage additional efforts in this domain.

Concerning VSP services that are fully integrated within the scope of the revised AVMSD, alongside Article 9, Article 28b also imposes a set of requirements specifically for VSP services. These rules are different for service providers that have direct control over the advertisement that is marked, sold and organised by them as opposed to those that have limited ability to control the content as it is not marked, sold and organised by VSP service. The former is obliged to comply with the requirement of Article 9(1) and Article 28(b) whereas the latter should apply measures stipulated in Article 9 “*taking into account the limited control exercised by those video-sharing platforms over those audiovisual commercial communications*” (Article 28(b)2(2)).

Similar to Article 9(4) on unhealthy food and beverages, the advertising of HFSS on VSPs platforms is not prohibited and “*Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct*” given their negative effect on children’s health and shall aim to ensure that such content does not “*emphasise the positive quality of the nutritional aspects of such foods and beverages*” (Article 28b(2)(2)). This provision also specifies that codes of conduct should be designed and facilitated in line with Article 4a(1) which specifies that the codes need to be”

- a. *“broadly accepted by the main stakeholders in the Member States concerned;*
- b. *clearly and unambiguously set out their objectives;*
- c. *provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at; and*
- d. *provide for effective enforcement including effective and proportionate sanctions.”*

A recent report by The European Consumer Organisation indicates that the current approach to regulating commercial communication about HFSS has been a missed opportunity for policymakers to protect children and impose stricter measures on HFSS foods. The Directive merely “encourages” MSs to use self- and co-regulatory measures, and “this goes against the evidence to date that such voluntary approaches have been too weak” (Calvert, 2021:5). The report also analysed compliance of the largest food companies like McDonald’s and Coca-Cola, Nestle with a self-regulatory EU level initiative the ‘EU Pledge’ to restrict HFSS foods advertisement among children. The report found that most of the companies did not respect the proposed restrictions and highlights the key pitfalls of the current regulatory approach to HFFS: there is no clear ban for advertising this content during prime time, proposed measures are not equipped to address challenges in the digital ecosystem, in particular concerning user-generated content, video games, and influencers (Calvert, 2021: 10,13,20).

## A brief overview of the relevant articles of the Revised AVMSD

The provisions for the protection of children against inappropriate commercial content are introduced in the Revised AVMSD. In particular, Recital 28 recognizes the existence of nutritional guidance at the national and international levels, and specifically mentions the World Health Organisation Regional Office for Europe’s nutrient profile model that *“differentiates foods based on their nutritional composition in the context of television advertising of foods to children.”* It goes further to encourage MSs to *“ensure that self- and co-regulation, including through codes of conduct, is used to effectively reduce the exposure of children to audiovisual commercial communications regarding foods and beverages that are high in salt, sugars, fat, saturated fats or trans-fatty acids or that otherwise do not fit those national or inter national nutritional guidelines.”* Similarly, for alcoholic beverages, Recital 29 encourages self- and co-regulatory codes of conduct to effectively reduce the exposure of children and minors to audiovisual commercial communications. The existing systems at the EU and national levels, already guide responsible marketing of alcoholic beverages, and they should be further encouraged, *“in particular those aiming at ensuring that responsible drinking messages accompany audiovisual commercial communications for alcoholic beverages.”*

Article 9(4) specifies the material scope of protection against inappropriate commercial communication of HFFS foods:

*“4. Member States shall encourage the use of co-regulation and the fostering of self-regulation through codes of conduct as provided for in Article 4a(1) regarding inappropriate audiovisual commercial communications, **accompanying or included in children’s programmes**, for foods and beverages containing nutrients and substances with a **nutritional or physiological effect**, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended” (emphasis added).*

The goal of these codes of conduct is to effectively reduce the exposure of children to inappropriate commercial communication and ensure that such commercial communications “do not emphasise the positive quality of the nutritional aspects of such foods and beverages” (Article 9(4)(2)).

Similarly, MSs are also encouraged to foster self- and co-regulation codes of conduct with VSPs “aiming at effectively reducing the exposure of children to audiovisual commercial communications for foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt or sodium and sugars, of which excessive intakes in the overall diet are not recommended”, ensuring that this commercial communication does not “emphasise the positive quality of the nutritional aspects of such foods and beverages” (Article 28b(2)(3)).

Concerning advertising alcoholic beverages, Article 9(1)(e) prohibits audiovisual commercial communication aimed specifically at minors and encourages the immoderate consumption of such beverages. Article 22(1) clarifies the requirements for the marketing of alcoholic beverages:

1. “it shall not be **aimed specifically at minors** or, in particular, **depict minors consuming these beverages** (a);
2. it shall not be **linked to consumption of alcohol to enhanced physical performance or driving** (b);
3. it shall **not create the impression that the consumption of alcohol** contributes towards **social or sexual success** (c);
4. it shall not claim that alcohol has **therapeutic qualities or that it is a stimulant**, a sedative or a means of resolving personal conflicts (d);
5. it shall not encourage **immoderate consumption of alcohol** or present abstinence or moderation in a negative light (e);

6. *it shall not place emphasis on **high alcoholic content as being a positive quality** of the beverages (f)” (emphasis added).*

Protection of minors against inappropriate commercial communication does not strictly prohibit commercial communication of HFSS food and beverages and instead merely encourages the use of existing national and international self- and co-regulatory principles that are accepted by the main stakeholders and in line with the policy objectives (Article 4(1)a)). In addition, it sets several requirements for the advertising of alcoholic beverages and recognizes the relevance of codes of conduct and other mechanisms to strengthen responsible advertising of such products.

## Country case analyses

The rules proposed in the revised AVMSD seek to limit minors' exposure to advertising for alcohol products and HFSS foods, ensuring that commercial communication does not cause physical, mental and moral detriment to minors. For all the media services providers these measures are stipulated in Article 9 whereas Article 28b applies only to commercial communication that is marked, sold and arranged by the VSPs (for those VSPs that have no control over commercial content, requirements set out in Article 9 still apply). In most European countries the requirements from these Articles are transposed verbatim (European Audiovisual Observatory, 2021: 51). Concerning advertising of alcoholic beverages and HFSS products, self-regulatory mechanisms are proposed in the majority of the cases whereas regulatory restrictions on the promotion of alcoholic and cigarette products differ from country to country. (ibid.:33).

To ensure complementarity with Chapter 4 - The protection of minors against harmful content online, including strengthening protections on video-on-demand services, this country analysis provides further insights into the regulatory provisions of Croatia, Sweden and Spain concerning the protection of minors against inappropriate communication. In this way, these two country analyses provide both general and specific oversight of their regulatory approaches towards the protection of minors.

**Table 9: Strengthening provisions to protect children from inappropriate audiovisual commercial communication - Overview**

Strengthening provisions to protect children from inappropriate audiovisual commercial communication		Comments
Policy objectives	<p>A higher degree of protection for the content which may impair the physical, mental or moral development of minors (Recital20);</p> <p>Encourage self- and co-regulatory codes of conducts to reduce exposure of children to commercial communication concerning HFSS food and alcoholic beverages (Recitals 28 and 29).</p>	<p>Advertising of HFSSs foods is permitted under the revised AVMSD subject to further regulation through self- and co-regulatory mechanisms.</p> <p>Advertising of alcoholic beverages is prohibited if it targets minors and further requirements are listed in Article 22.</p>
Relevant Revised AVMSD provisions (numbering according to the Consolidated version of the AVMSD) - see for reference the Excel AVMSD Tracking Table	<p>Article 9(1)e - prohibition of commercial communication for alcoholic beverages aimed specifically at minors and promoting immoderate consumption;</p> <p>Article 9(3) - use of self- and co-regulatory codes of conduct regarding inappropriate commercial communication for alcoholic beverages;</p> <p>Article (22) - special requirements for television advertising and teleshopping for alcoholic beverages;</p> <p>Article 9(4) - use of self- and co-regulatory code of conduct regarding inappropriate commercial communication for HFSS (applicable to all media service providers);</p> <p>Article 28b(2)- use of self- and co-regulatory code of conduct regarding inappropriate commercial communication for HFSS (applicable only to advertising organised, marked and sold by VSPs).</p>	
Relevant provisions of the Law on Electronic Media and/ or the Law on Advertising	<p>Current Law on Electronic media does not cover issues concerning the protection of minors. Law on Advertising contains a provision about the protection of minors from harmful commercial content (Article 5 - co-regulation, Article 10 - protection of health and safety of individuals, Articles 46, 47 and 49- rules on advertising for alcoholic beverages, Article 50 - rules on advertising for tobacco products, Article 54,56 - promotion of gambling);</p> <p>The existing audiovisual media regulation does not regulate VSPs.</p>	

Strengthening provisions to protect children from inappropriate audiovisual commercial communication		Comments
<p>Transposition of the 2018 revision of the AVMSD in selected EU Member States</p>	<p>Member State 1: Croatia in-depth analyses and relevance to Serbia</p> <p>Article 9(1)e - prohibition of commercial communication for alcoholic beverages aimed specifically at minors and promoting immoderate consumption [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 21 (6) verbatim to that of the revised AVMSD;</p> <p>Article 9(3) - use of self- and co-regulatory codes of conduct regarding inappropriate commercial communication for alcoholic beverages; [HR]The Electronic Media Act - Consolidated 22 October 2021 - Art. 21 (14) verbatim to that of the revised AVMSD;</p> <p>Article (22) - special requirements for television advertising and teleshopping for alcoholic beverages [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 35 (5) verbatim to that of the revised AVMSD;</p> <p>Article 9(4) - use of self- and co-regulatory code of conduct regarding inappropriate commercial communication for HFSS [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 21 (13) verbatim to that of the revised AVMSD;</p> <p>Article 28b(2) - use of self- and co-regulatory code of conduct regarding inappropriate commercial communication for HFSS [HR] The Electronic Media Act - Consolidated 22 October 2021 - Art. 96 (5) verbatim to that of the revised AVMSD.</p>	

Strengthening provisions to protect children from inappropriate audiovisual commercial communication	Comments
<p>Member State 2: Spain in-depth analyses and relevance to Serbia</p> <p>Article 9(1)e - prohibition of commercial communication for alcoholic beverages aimed specifically at minors and promoting immoderate consumption [ES] Law 13/2022 of 7 July on General Audiovisual Communication - Art. 123 3. point a) and e) verbatim to that of the revised AVMSD;</p> <p>Article 9(3) - use of self- and co-regulatory codes of conduct regarding inappropriate commercial communication for alcoholic beverages [ES] Law 13/2022 of 7 July on General Audiovisual Communication - Art. 15.4 e verbatim to that of the AVMSD;</p> <p>Article (22) - special requirements for television advertising and teleshopping for alcoholic beverages [ES] Law 13/2022 of 7 July on General Audiovisual Communication - Art. 123 3. to 5. - verbatim to that of the revised AVMSD with a limit imposed on the broadcasting time</p> <ul style="list-style-type: none"> <li>- for alcoholic products with strength over 20% volume allowed only between 1.00 and 5.00;</li> <li>- for alcoholic products with a strength equal to and below 20% volume allowed only between 20:30 and 05.00 and outside that hour “when such audiovisual commercial communications form an indivisible part of the acquisition of rights and the production of the signal to be broadcast” (paras.4 and 5).</li> </ul> <p>Article 9(4) - use of self- and co-regulatory code of conduct regarding inappropriate commercial communication for HFSS [ES] Law 13/2022 of 7 July on General Audiovisual Communication - Art. 124 3. – verbatim to that of the revised AVMSD. The article continues by introducing a special rule that: if codes of conduct in this regard have not been adopted or if the competent audiovisual authority reaches the conclusion that a code of conduct or part of the latter has not proven effective enough, the Government shall establish in legislation restrictions on the content of the messages or the time at which such audiovisual commercial communications may be broadcast, to guarantee the protection of minors.”</p> <p>Article 28b(2) - use of self- and co-regulatory code of conduct regarding inappropriate commercial communication for HFSS [ES] Law 13/2022 of 7 July on General Audiovisual Communication - Art. 91 1. to 3 – verbatim to that of the revised AVMSD</p>	<p>Provisions include requirements and limitations stipulated in the revised AVMSD but also provide additional limitations for the broadcaster that are allowed only to advertise alcoholic beverages in the night programme.</p> <p>Protection of children against exposure to HFSS foods shall be specifically limited in the regulation if the codes of conducts provided to be not effective enough.</p>



	Strengthening provisions to protect children from inappropriate audiovisual commercial communication	Comments
	<p>Member State 3: Sweden in-depth analyses and relevance to Serbia</p> <p>Article 9(1)e - prohibition of commercial communication for alcoholic beverages aimed specifically at minors and promoting immoderate consumption [SE] Radio and Television Act - (2010:696) – consolidated 30 June 2022 - Art. Chapter 6, Section 2 and Chapter 8, section 14</p> <p>Prohibition of product placement for alcoholic beverages;</p> <p>Article 9(3) - use of self- and co-regulatory codes of conduct regarding inappropriate commercial communication for alcoholic beverages; [SE] No article;</p> <p>Article (22) - special requirements for television advertising and teleshopping for alcoholic beverages [SE] Law on Alcohol (2010:1622) – Consolidated 1st December 2020 - Art. Chapter 7, Sections 1 and 3</p> <p>Special care shall be taken when marketing alcoholic beverages and shall not specifically target or depict children under age 25 (Section 1).</p> <p>Prohibition of advertisements for alcoholic beverages in television broadcasts, on-demand services and radio broadcasts. VSPs are prohibited from advertising these products before, during or after user-generated videos or television programmes (Section 3);</p> <p>Article 9(4) - use of self- and co-regulatory code of conduct regarding inappropriate commercial communication for HFSS [SE] No article.</p>	<p>Prohibition of commercial communication for alcoholic beverages targeting and depicting children under 25 – thus age limit is set high.</p> <p>Prohibition of advertisement for these products for broadcasters, radio, and on-demand and specific transmission requirements for VSPs.</p>
<p>Proposed regulatory interventions and implementation measures</p>	<p>ES:</p> <ul style="list-style-type: none"> <li>- Special limitation for broadcasters concerning the transmission of advertising content for alcoholic beverages, limited to night programmes;</li> <li>- Regulatory interventions and further limitations allowed in relation to the marketing of HFSS foods if co-regulatory codes of conducts prove inadequate and ineffective.</li> </ul> <p>SE</p> <ul style="list-style-type: none"> <li>- Prohibition of commercial communication of alcoholic products for broadcasters and VODs and limitations for VSPs.</li> </ul>	

## Conclusions and recommendations

The in-depth country case analysis indicates that the selected countries have largely transposed the relevant provisions of the revised AVMSD verbatim. In some cases, additional limitations are imposed on broadcasters and on-demand services that allow advertising of alcoholic beverages only in the night programme (Spain) or in the case of VSPs such advertising is allowed only before, during or after user-generated videos or television programmes (Sweden). Sweden also introduced a general prohibition of TV commercials during programmes appealing to children under 12 and for programmes for children under 12 advertising cannot precede or follow such programmes (European Commission). Also, it is relevant that the Spanish regulator ensured a legal basis for further limitations on the promotion of HFSS foods if the co-regulatory efforts prove to be ineffective. Limited insight into the transposition practices of other countries suggests that, for example, in Ireland, advertising, teleshopping, sponsorship and product placement of HFSS foods are prohibited during children's programmes. Ireland also introduces a frequency limit of up to 25% of sold advertising time promoting these products. Similarly, Norway introduced a total ban on HFSS for broadcasters during children's programmes (Ibid).

In line with the previous discussion, it is recommended to consider the following set of recommendations:

- Requirements for and limitations to advertising alcoholic beverages should follow provisions of Article 9 and Article 22 of the revised AVMSD. The existing provisions in the Law on Advertising should be amended to reflect the novel requirements and, in particular, include on-demand service providers. Limitations on broadcasting time like in the case of Spain are also an effective regulatory mechanism to prevent exposure of children to the promotion of alcoholic beverages and should be considered by the Serbian legislator;
- Legislators in Serbia should encourage and facilitate co-regulatory agreements and codes of conducts on reducing exposure of children to the advertising of alcoholic beverages and HFSS foods but should be mindful of the limited effect of these measures. Thus, like in the case of Spain, introduce a legal base to monitor the effectiveness of these agreements and allow for intervention, especially concerning HFSS foods. HFSS foods are currently not incorporated in the Law on Advertising;
- Further limitations on the advertisement of HFSS foods are recommended, especially during, before and after children's programmes, including on VODs;
- About VSPs, the Croatian law merely encourages co-regulatory codes of conducts to reduce exposure of children to HFSS foods, which is also a preferred option for Serbia due to its limited normative experience in regulating and collaborating with VSPs that are by and large established in other European countries.

## 8. Independence of audiovisual regulators

Media regulators in Europe are key actors in safeguarding pluralism, and their independence is crucial in this role. However, there have been several cases in which these regulators were formally compliant with set legal requirements on independence, but in reality, acted very differently, and enforced typically political agendas, thus not serving the public at large. Within the previous European policy framework, there were no EU-level safeguards and no institutional mechanisms to ensure the independent operation of national regulators ([Polyák and Rozgonyi, 2015](#)).

This situation has changed since the Revised ASVMD introduced a *strict and detailed obligation for EU MSs* to designate one or more independent national regulatory authorities (NRAs) to oversee the broadcasting and audiovisual media sector within the respective national context. The(se) NRAs must be *legally distinct from the government* and *functionally independent* from their respective governments and any other public or private body (Article 30 AVMSD). By introducing this explicit obligation, the Revised AVMSD has *extensively codified the independence and effective functioning of the NRAs*, and the requirement of *functional independence* is the new and most significant element designed to complement the formal *de iure* independence of NRAs (Irion and Til, 2019).

Furthermore, towards the EU-level governance of media regulation, the European Regulators Group for Audiovisual Media Services (ERGA) was established by the Revised AVMSD (Article 30b). The ERGA is composed of representatives of independent regulatory authorities of the EU MSs and functions as a network for cooperation between regulators in the context of the AVMSD.

### Analyses

The policy objectives of Article 30 of the Revised AVMSD were laid down in Recital (53) stating that *MSs were to ensure that their NRAs are legally distinct from the government*. However, this should not preclude MSs from supervising by their national constitutional law. Moreover, Recital (53) provides additional information on the requisite degree of *actual independence* by stipulating, that “(...) national regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if those authorities or bodies, including those that are constituted as public authorities or bodies, are functionally and effectively independent of their respective governments and any other public or private body”. Furthermore, it was highlighted, that the NRAs “(...) should have the enforcement powers and resources necessary for the fulfilment of their tasks, in terms of staffing, expertise and financial means”, indicating that functional and effective independence reiterates the need for the necessary level of professionalism provided for and within the NRA. Also,

Recital (53) highlighted that NRAs “(...) should ensure respect for the objectives of media pluralism, cultural diversity, consumer protection, the proper functioning of the internal market and the promotion of fair competition”.

The core of the new provisions was laid down in Article 30 of the Revised AVMSD.

## “CHAPTER XI

### **REGULATORY AUTHORITIES AND BODIES OF THE MEMBER STATES**

#### *Article 30*

1. Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.

2. Member States shall ensure that national regulatory authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.

National regulatory authorities or bodies shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law. This shall not prevent supervision in accordance with national constitutional law.

3. Member States shall ensure that the competencies and powers of the national regulatory authorities or bodies, as well as the ways of making them accountable are clearly defined in law.

4. Member States shall ensure that national regulatory authorities or bodies have adequate financial and human resources and enforcement powers to carry out their functions effectively and to contribute to the work of ERGA. Member States shall ensure that national regulatory authorities or bodies are provided with their own annual budgets, which shall be made public.

5. Member States shall lay down in their national law the conditions and the procedures for the appointment and dismissal of the heads of national regulatory authorities and bodies or the members of the collegiate body fulfilling that function, including the duration of the mandate. The pro-

cedures shall be transparent, and non-discriminatory and guarantee the requisite degree of independence. The head of a national regulatory authority or body or the members of the collegiate body fulfilling that function within a national regulatory authority or body may be dismissed if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance at national level. A dismissal decision shall be duly justified, subject to prior notification and made available to the public.

6. Member States shall ensure that effective appeal mechanisms exist at national level. The appeal body, which may be a court, shall be independent of the parties involved in the appeal.

Pending the outcome of the appeal, the decision of the national regulatory authority or body shall stand, unless interim measures are granted in accordance with national law.”

## A brief overview of the relevant articles of the Revised AVMSD

As one can observe, Article 30 entails a complex and complementary set of obligations towards the MSs, which should ensure in their respective legislation the full de iure and (!) de facto independence of the NRA while parallel providing for its accountability towards the public. The legislative tasks and codification methods in meeting both policy objectives will render the Serbian legislator to carefully consider these intertwined requirements to find the most appropriate solutions.

The further provisions of the Revised AVMSD are also relevant to the Serbian legislature. In Article 30a the obligation for information exchange vis-a-vis the European Commission and towards the other EU NRAs is laid down focusing on the transborder provision of AV services. The REM should be rendered by the law to act expeditiously once receiving information from a media service provider under Serbian jurisdiction “that it will provide a service wholly or mostly directed at the audience of another Member State” and informing the REM of the targeted Member State. Furthermore, if the territory of Serbia is targeted by a media service provider under the jurisdiction of another Member State, the REM should send a request concerning the activities of that provider to the NRA of the Member State having jurisdiction over it, whereby the latter NRA shall do its utmost to address the request within two months (or even within stricter time limits). The corresponding rules meeting the requirements of the Revised AVMSD should be adopted in the Serbian legislation accordingly.

Based on the detailed analyses of Article 30 AVMSD, we could conclude, that the most important aspects of the new provisions for the Serbian legislators are the following:

- a. the national law should enact legal guarantees on the regulatory authority (Regulatory

Authority for Electronic Media - REM) “shall not seek or take instructions” from any other body when implementing the AVMSD;

- b. the competencies and powers of the REM should be clearly defined;
- c. the REM should be provided with adequate financial and human resources and enforcement powers to carry out their functions effectively; while
- d. the REM should act in full transparency and public accountability about internal budgeting matters; and
- e. the detailed conditions and the procedures for the appointment and dismissal of the heads of REM or the members of the collegiate body fulfilling that function, including the duration of the mandate, should also be laid down in the national legislation, whereby a dismissal decision shall be duly justified, subject to prior notification and made available to the public, and the right to an effective remedy in such a situation should also be stipulated in national law, whereby the appeal body for the exercise of the right to remedy “shall be independent of the parties involved in the appeal”; finally
- f. the REM should be obliged to “exercise their powers impartially and transparently” in an “accountable” manner under clearly defined standards in the law, including “supervision by national constitutional law”.

## Country case analyses

The most comprehensive overview of the transposition of the rules and the critical analyses of the implementation procedures was provided by the Council of Europe in 2019 ([The independence of media regulatory authorities in Europe, 2019](#)). Although at the time of reporting transposition of the Revised AVMSD into national law was lagging in most EU MSs, several conclusions could have been drawn by the rapporteurs already in those countries, where the process was underway. It was found, that “(a)ccording to the individual country reports, many countries, such as Spain and Slovenia, appear to have high functional independence by both Council of Europe standards and the new AVMS Directive. In Bosnia and Herzegovina, though, despite the authority’s high functional independence, the latter may be exposed due to the politicised nature of the appointment of the regulatory authority’s key decision-making bodies. Some countries, including the Netherlands and Sweden, do not have a high level of independence guaranteed by law but have high de facto independence. However, in other cases, the absence of specific legislation concerning the independence of the regulatory authority may expose it to political pressure, as in Poland or Hungary, where local legislation on independence may be satisfactory at the EU level, while the regulatory authority may present issues in its functioning.” (Ibid.: 118).

The overall picture of the transposition and the actual changes to the independence of the NRAs across the EU is still scattered (Polyák, 2022), (Ranaivoson, Broughton Micova and Raats, 2023a). In any case, we have selected three countries - Croatia, Slovenia and Spain - as the object of the case studies and further analysed the status of the corresponding legislation on the matter.

Croatia (HR) has fully transposed the Revised AVMSD into national law (Law on Electronic Media (ZEM)) by 1st October 2021 and since then has also adopted several rulebooks detailing the transposition of specific articles of the AVMSD. HR was also eligible for the case study because of the regional similarities.

Slovenia (SI), which was reported as a country having high functional independence by both Council of Europe standards and the new AVMS Directive (The independence of media regulatory authorities in Europe, 2019): 118), completed the transposition of the AVMSD by August 2022 by the Act Amending the Audiovisual Media Services Act and has also prepared and amended another six General Acts<sup>29</sup>. It was reported, that before the transposition, the national law in Slovenia was already largely “aligned with the new codification of regulatory independence as envisaged by Article 30 of the 2018 AVMS Directive”, and it was foreseen “(...) the announced revision of the law governing electronic communications (and AKOS) will need to preserve the current safeguards of legal and functional independence of the national regulatory authority and only add a few details such as those requiring adequate resources for participating in the work of ERGA.” (The independence of media regulatory authorities in Europe, 2019): 113).

Spain (ES), which also has reportedly guaranteed a high level of functioning independence (Ibid.: 118), it was foreseen, that “(...) the implementation of Article 30 of the AVMS Directive may require some adjustments to Spanish regulation to strengthen the independence of the media regulatory authority: first, to ensure real autonomy in the distribution of the budget without the requirement of authorisation by government officials, especially regarding human resources; secondly, to review dismissal procedures, since Article 30 mandates a public justification, which is not currently foreseen in Spanish law” and “(...) a direct appointment of the Board by the Legislator with a strong majority of 2/3 could represent a more representative and democratic approach.” (*The independence of media regulatory authorities in Europe, 2019*) Ibid.: 53).

Table 10 provides the details of the legislative measures taken in the countries selected for the case analyses.

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<sup>29</sup> See the update of the status at: <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking> (retrieved on 17 January 2023).

**Table 10: Independence of audiovisual regulators - Overview**

The independence of audiovisual regulators		Comments
Policy objectives	<ol style="list-style-type: none"> <li>1. Functional and effective independence of the NRA from the government and of any other public or private body</li> <li>2. Accountability of the NRA</li> </ol>	The policy objectives were set in Recital 53.
Relevant Revised AVMSD provisions (numbering according to the Consolidated version of the AVMSD) - see for reference the Excel AVMSD Tracking Table	<p>CHAPTER XI - REGULATORY AUTHORITIES AND BODIES OF THE MEMBER STATES</p> <p>Articles 30, 30a, 30b</p>	Article 30b does not need national transposition.
Relevant provisions of the Law on Electronic Media and/or the Law on Advertising	<p>Law on Electronic Media</p> <p>II REGULATORY BODY FOR ELECTRONIC MEDIA</p> <p>Articles 5-42</p>	The relevant parts of the Law on Electronic Media will need a comprehensive revision in order to meet the policy objectives of the transposition.



The independence of audiovisual regulators		Comments
<p>Transposition of the 2018 revision of the AVMSD in selected EU Member States</p>	<p>Member State 1: in-depth analyses and relevance to Serbia - Croatia (HR)</p> <p>Art. 30 (1) AVMSD</p> <p><i>Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 73</i></p> <ul style="list-style-type: none"> <li>- the legal founding of the Agency is the Republic of Croatia (AEM) as an autonomous, independent and non-profit legal person with public authority falling within the scope and jurisdiction laid down by this Act;</li> <li>- the founder of AEM is the Republic of Croatia, while founder's rights are exercised by the Croatian Parliament;</li> <li>- legal declaration of independence of AEM by declaring any form of influence over the work of the Agency that might undermine its autonomy and independence to be prohibited;</li> <li>- the bodies of AEM are the director of and the Electronic Media Council;</li> </ul> <p><i>[HR] Statut Agencije za elektroničke medije - Art. 1</i></p> <ul style="list-style-type: none"> <li>- reiterating the provisions of the law.</li> </ul> <p>Art. 30 (2) AVMSD</p> <p><i>Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 74</i></p> <ul style="list-style-type: none"> <li>- the obligation to set up a specialist service performing specialist, administrative and technical tasks within AEM, tasks including preparing the annual work programme, annual financial plan and projections for the next 2 years, and the annual activity report and financial statements;</li> <li>- strict rules on professional independence of the staff of AEM: workers of AEM shall not serve as members of management or supervisory boards or boards of directors of media service providers or as members of any other forms of interest groupings, which might cast doubt on their impartiality in conducting procedures falling within the remit of AEM; exceptionally, they may serve as members and participants of scientific associations, societies and projects, provided that this does not affect their impartiality in conducting procedures;</li> </ul> <p><i>Statut Agencije za elektroničke medije - Art. 10 (1) and (2)</i></p> <ul style="list-style-type: none"> <li>- setting the duties of the Council to manage AEM and perform the tasks of a regulatory body in the field of electronic media;</li> </ul> <p>Art. 30 (3) AVMSD</p> <p><i>Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 74, 75, 77 and 78</i></p>	<p>Most relevant provisions of the Croatian legislation with utmost relevance to the Serbian transposition:</p> <ul style="list-style-type: none"> <li>- strict rules on professional independence of the staff of the NRA;</li> <li>- financial autonomy provisions: guarantees of independence;</li> <li>- fixed and non-renewable mandates of the members of the governing body/ Council of the NRA;</li> <li>- strict and detailed rules on conflict of interest and of compliance of the members of the governing body/ Council of the NRA;</li> <li>- strict consequences of dismissal and the prevention of a revolving-door-effect of the members of the governing body/ Council of the NRA.</li> </ul>

The independence of audiovisual regulators	Comments
<ul style="list-style-type: none"> <li>- detailed task descriptions with regard to the competencies and powers of AEM;</li> <li>- the Council has the right to monitor the implementation and execution of the annual work programme and financial plan of AEM (accountability measure);</li> </ul> <p><i>Statut Agencije za elektroničke medije - Art. 16</i></p> <ul style="list-style-type: none"> <li>- reiteration of the provisions set in the law;</li> </ul> <p>Art. 30 (4) AVMSD</p> <p><i>Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 81</i></p> <ul style="list-style-type: none"> <li>- financial autonomy provisions: the financial resources of AEM - based on their annual financial plan - were set o sem from the amount equal to 0.5% of the total annual gross revenue generated in the previous year by media service providers (on-demand audio and/or audiovisual media services, television and/or radio media services, electronic publication services and video-sharing platform services);</li> <li>- AEM shall be held liable for its own liabilities with all of its assets, whereas the Republic of Croatia shall have unlimited liability for the liabilities of AEM;</li> </ul> <p><i>Statut Agencije za elektroničke medije - Art. 23 and 24</i></p> <ul style="list-style-type: none"> <li>- reiterating the provisions of the law and setting the details of the annual financial plan;</li> </ul> <p>Art. 30 (5) AVMSD</p> <p><i>Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 76</i></p> <ul style="list-style-type: none"> <li>- the Council of AEM shall have seven members (several professional requirements are set in the law on the qualifications of the members), one of which shall be the president;</li> <li>- the president and other members of the Council shall be appointed (after a public call for application) and dismissed by the Croatian Parliament at the proposal of the Croatian Government;</li> <li>- maximum term of 5 years, which may be extended by a maximum of 6 months until a new president and/or member of the Council is appointed;</li> <li>- strict and detailed rules on conflict of interest and of compliance;</li> <li>- dismissal of members of Council: non-performance, incapacity due to illness, other similar reasons, and also if their work or behaviour calls into question their own or the Agency's reputation or their own or the Agency's autonomy and independence;</li> </ul>	

The independence of audiovisual regulators	Comments
<ul style="list-style-type: none"> <li>- strict consequences of dismissal: the president, vice-president or member of the Council shall not be appointed, within 1 year of their dismissal, as a member of the management or supervisory board or board of directors in legal persons which are subject to the provisions of the law; and also</li> <li>- grace-period of 6 months in case expiry of the term or of voluntary resignation: no employment with the sector compensated with due remuneration in order to prevent a revolving-door-effect;</li> </ul> <p><i>Statut Agencije za elektroničke medije - Art. 10 (3) and (4) and 11</i></p> <ul style="list-style-type: none"> <li>- obligation of the members of the Council to act conscientiously and in accordance with the moral and ethical principles and rules of the profession, to ensure the application of the principles of transparency, objectivity and impartiality, to attend and vote at the sessions of the Council, to keep confidential the information they learn in the work of the Agency, and to act in accordance with obligations they have according to the Law, other regulations, general acts of the Agency and this Statute;</li> </ul> <p>Art. 30 (6) AVMSD <i>Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 82</i></p> <ul style="list-style-type: none"> <li>- majority voting within the Council;</li> <li>- decisions, formal notices and other administrative acts of the Agency shall not be subject to appeal, but administrative proceedings may be instituted against them before the administrative court with territorial jurisdiction;</li> <li>- in the event of non-compliance with the executive decision or any other administrative act of the Agency, the Council may issue a minor offence warrant or file a motion to indict in minor offence proceedings;</li> </ul> <p><i>Statut Agencije za elektroničke medije - Art. 12 (3)</i></p> <ul style="list-style-type: none"> <li>- reiterating the provisions of the law;</li> </ul> <p>Art. 30a (1) AVMSD <i>Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 77 (1) 16.</i></p> <ul style="list-style-type: none"> <li>- an obligation to cooperate with the regulatory bodies of other States and/or the European Commission in the exchange of information;</li> </ul> <p>Art. 30a (2) AVMSD <i>Zakon o Elektroničkim Medijima - Prečišćen 22. listopada 2021 - Art. 7, 26 (3), 85 (7), 92 (3)</i></p> <ul style="list-style-type: none"> <li>- obligation of the Council to exchange information with other NRAs in order to establish jurisdiction;</li> </ul> <p>Art. 30a (3) AVMSD No transposition.</p>	

The independence of audiovisual regulators	Comments
<p>Member State 2: in-depth analyses and relevance to Serbia - Slovenia (SI)</p> <p>The Act on Amendments to the Act on Audiovisual Media Services (ZAvMS-B) (Official Gazette of the Republic of Slovenia, No. 204/21) transposed the Revised AVMSD into national law in Slovenia, however, no changes have been made to the status of the NRA/AKOS. The Slovenian legislator did not see the need for furthering the legal guarantees of independence of the NRA/AKOS, and the European Commission did not raise concerns in this regard (no infringement procedure was put in place). Thus, we could argue, that the independence of the NRA/AKOS should have been sufficient prior to the revision of the AVMSD, thus, we could refer to the previous legislation in place in Slovenia for the purposes of our analyses. Therefore, we are recalling here the highlights of the country report drafted before the transposition process was concluded (<i>The independence of media regulatory authorities in Europe</i>, 2019): 107-113) - see excerpts in the following):</p>	<p>Most relevant provisions of the Slovenian legislation with utmost relevance to the Serbian transposition:</p> <ul style="list-style-type: none"> <li>- guarantees of independent functioning of the NRA: the operational heads of the NRA (including the directory) are not bound by instruction of the council or any other body in the performance of their duties as regards audiovisual media services;</li> <li>- supervision by the Government does not entail any interference with the content of general or specific legal acts issued by the NRA.</li> </ul>

The independence of audiovisual regulators	Comments
<ol style="list-style-type: none"> <li>1. The Slovenian Agency for Communication Networks and Services (AKOS) was established as a converged authority in 2001, and the original law already contained high safeguards of independence (ZEKom-1). As a public agency, a corporate body governed by the Public Agencies Act, AKOS is legally distinct from the government.</li> <li>2. The bodies of AKOS are the Agency Council and the Agency Director. The Council has the right and the duty to oversee the operation of AKOS and ensure internal accountability. Importantly, neither AKOS nor its main decision-making organ, the AKOS Director, are bound by instruction of the council or any other body in the performance of their duties as regards audiovisual media services.</li> <li>3. AKOS' functional independence of the Slovenian government is high; its powers range from general policy-implementing powers to information-collecting powers, markets monitoring and services supervision, enforcement powers, as well as the dispute and complaints handling. ZEKom-1 clearly states, however, that this supervision does not give grounds to interfere with the content of general or specific legal acts issued by AKOS in relation to the exercise of its powers under the laws in the fields of its operation.</li> <li>4. Accountability: Transparency is an important highlight of the AKOS regulation principles as stipulated by ZEKom-1.</li> <li>5. Financial independence: AKOS has been exclusively funded by industry fees with a fairly stable annual income.</li> <li>6. Adequate enforcement powers: AKOS has at its disposal a varied range of enforcement powers: from a warning to penalty fines.</li> <li>7. Appointment and dismissal procedures:             <ol style="list-style-type: none"> <li>a. based on a public competition, the Agency Director is appointed by the government; dismissal: in cases of non-compliance with the law and/or no capacity to work;</li> <li>b. Agency Council Members are recruited via a public call and appointed by the government, while members of the Council cannot be dismissed as a whole.</li> </ol> </li> </ol>	

The independence of audiovisual regulators	Comments
<p>Member State 3: in-depth analyses and relevance to Serbia - Spain (ES)</p> <p>Art. 30 (1) AVMSD</p> <p><i>Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia - Consolidado 28 diciembre 2021 - Art. 1, 2 1. and 2., 3 1. and 22</i></p> <ul style="list-style-type: none"> <li>- legal foundation of the National Commission on Markets and Competition (NCMC) as a public body;</li> <li>- declaration of independence of the NCMC with regard to organisational and functional autonomy and complete independence from the Government, public administrations and market stakeholders, while setting the obligation to act independently of any business or commercial interest;</li> <li>- while rendering NCMC accountable and subject to parliamentary and judicial scrutiny;</li> </ul> <p><i>Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual - Art. 153.2, 4 and 5</i></p> <ul style="list-style-type: none"> <li>- regulating the competencies of the NCMC on state level and of the competent audiovisual authorities at the Autonomous Community level;</li> </ul> <p>Art. 30 (2) AVMSD</p> <p><i>Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia - Consolidado 28 diciembre 2021 - Art. 1 2., 2 1. and 2., 3 2. 37 and 39</i></p> <ul style="list-style-type: none"> <li>- transparency obligations set towards the NCMC to make public all provisions, resolutions, decisions and reports issued under the law regulating them, once they have been notified to interested parties, after taking a decision — where appropriate — on the confidential aspects of said resolutions, decisions and reports, and following removal of the personal data; a non-exhaustive list on specific transparency measures, including yearly sectoral economic reports, which shall analyse the competitive situation of the sector, the conduct of the public sector and the prospects for evolution of the sector;</li> <li>- accountability of the Chair of the NCMC: obligation to appear at annual hearings of the relevant parliamentary committee in the Congress of Deputies;</li> </ul> <p>Art. 30 (3) AVMSD</p> <p><i>Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia - Consolidado 28 diciembre 2021 - Art. 4 1., 5 1. to 4. and 9</i></p> <ul style="list-style-type: none"> <li>- detailed enlisting of the tasks of the NCMC in performing its duties and competencies, including the obligation to act as arbitrator in the disputes of AV media service providers;</li> </ul>	<p>Most relevant provisions of the Spanish legislation with utmost relevance to the Serbian transposition:</p> <ul style="list-style-type: none"> <li>- accountability of the NRA: transparency obligations to make public all provisions, resolutions, decisions and reports issued;</li> <li>- professional accountability: the obligation to conduct studies and research on competition, as well as general reports on the audiovisual media sectors;</li> <li>- professional accountability: the obligation to conduct reports (impact assessments) in the process of drawing up binding rules;</li> <li>- guarantees on political independence of the members of the Board of the NRA;</li> <li>- fixed term and non-renewable mandate of the members of the Board of the NRA.</li> </ul>

The independence of audiovisual regulators	Comments
<ul style="list-style-type: none"> <li>- obligation of the NCMC to cooperate with the relevant bodies in the Autonomous Communities and cooperating with the Spain's national authorities and the courts;</li> <li>- obligation to conduct studies and research on competition, as well as general reports on economic sectors;</li> <li>- obligation to conduct reports (impact assessments) in the process of drawing up rules affecting its scope of competence in the sectors under its supervision, antitrust legislation and its legal framework;</li> </ul> <p>Art. 30 (4) AVMSD</p> <p><i>Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia - Consolidado 28 diciembre 2021 - Art. 4 2. and 5 5.</i></p> <ul style="list-style-type: none"> <li>- declaration of the obligation of the State to provide for adequate financial and human resources of the NCMC;</li> </ul> <p>Art. 30 (5) AVMSD</p> <p><i>Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia - Consolidado 28 diciembre 2021 - Art. 15, 23 and 25</i></p> <ul style="list-style-type: none"> <li>- the members of the Board [of the CNMC], including the Chair and the Vice-Chair, shall be appointed by the Government, by Royal Decree, on a proposal from the Minister for Economic Affairs and Competitiveness from among individuals of recognised authority and professional expertise in the field of activity of the CNMC following a public hearing;</li> <li>- guarantees on political independence of the members of the Board of the NCMC: the Congress, through the relevant committee acting by an absolute majority, may veto the appointment of the proposed candidate within one calendar month of receiving the relevant communication (if the Congress does not announce any express position by the end of this period, the appointment will be deemed to have been accepted);</li> </ul>	

The independence of audiovisual regulators	Comments
<ul style="list-style-type: none"> <li>- the term of office of the members of the Board shall be six years without the possibility of renewal. The members of the Board shall be renewed on a partial basis every two years so that each member of the Board shall not remain in his or her post for more than six years;</li> <li>- dismissal: due to a serious breach of the duties of the appointment or non-compliance with the obligations concerning incompatibilities, conflicts of interest and the statutory duty of non-disclosure;</li> </ul> <p>Art. 30 (6) AVMSD  <i>Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia - Consolidado 28 diciembre 2021 - Art. 36</i></p> <ul style="list-style-type: none"> <li>- acts and decisions by bodies of the CNMC other than the Chair or the Board may be subject to administrative appeal;</li> </ul> <p>Art. 30a (1) AVMSD  <i>Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia - Consolidado 28 diciembre 2021 - Art. 4 2.</i></p> <ul style="list-style-type: none"> <li>- <i>obligation to work regularly and periodically with the EU institutions and bodies, in particular the European Commission, and with the competent authorities and bodies in other Member States;</i></li> </ul> <p>Art. 30a (2) AVMSD  <i>Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual - Art. 48 a)</i></p> <ul style="list-style-type: none"> <li>- obligation of the CNMC on mutual exchange of information between national audiovisual regulatory authorities or bodies of the MSs of the European Union;</li> </ul> <p>Art. 30a (3) AVMSD  <i>[ES] Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual - Art. 48 b) and c)</i></p> <ul style="list-style-type: none"> <li>- obligation of the CNMC to use the mechanisms for cooperation between audiovisual registers regulated.</li> </ul>	



The independence of audiovisual regulators	Comments
<p>Proposed regulatory interventions and implementation measures</p> <p>Most relevant provisions of the Croatian legislation with utmost relevance to the Serbian transposition:</p> <ul style="list-style-type: none"> <li>- strict rules on professional independence of the staff of the NRA;</li> <li>- financial autonomy provisions: guarantees of independence;</li> <li>- fixed and non-renewable mandates of the members of the governing body/Council of the NRA;</li> <li>- strict and detailed rules on conflict of interest and of compliance of the members of the governing body/Council of the NRA;</li> <li>- strict consequences of dismissal and the prevention of a revolving-door-effect of the members of the governing body/Council of the NRA.</li> </ul> <p>Most relevant provisions of the Slovenian legislation with utmost relevance to the Serbian transposition:</p> <ul style="list-style-type: none"> <li>- guarantees of independent functioning of the NRA: the operational heads of the NRA (including the directory) are not bound by instruction of the council or any other body in the performance of their duties as regards audiovisual media services;</li> <li>- supervision by the Government does not entail any interference with the content of general or specific legal acts issued by the NRA.</li> </ul> <p>Most relevant provisions of the Spanish legislation with utmost relevance to the Serbian transposition:</p> <ul style="list-style-type: none"> <li>- accountability of the NRA: transparency obligations to make public all provisions, resolutions, decisions and reports issued;</li> <li>- professional accountability: the obligation to conduct studies and research on competition, as well as general reports on the audiovisual media sectors;</li> <li>- professional accountability: the obligation to conduct reports (impact assessments) in the process of drawing up binding rules;</li> <li>- guarantees on political independence of the members of the Board of the NRA;</li> <li>- fixed term and non-renewable mandate of the members of the Board of the NRA.</li> </ul>	

## Conclusions and recommendations

The novelty of the Revised AVMSD about the independence of the national regulatory authorities is the *strictly codified requirements towards the national legislators to guarantee the formal (de iure) AND the functional independence of the NRA*. These guarantees should include independence from the government and any other public or private body; financial independence; professional independence; and accountability of the NRA. Importantly, throughout the implementation of the Revised AVMSD newly adopted guarantees on functional independence of the REM should be complemented with adequate measures of accountability, introducing regular monitoring of REM's actions. In order to improve the accountability of REM, it is recommended (Polyák & Rozgonyi, 2015) to complement independence indicators with conclusions derived from reviewing the REM's actual work and decisions, with particular focus on (1) *transparency of decision-making* (e.g. availability of detailed justification of decisions; the regularity of public consultations and their impact); on (2) *market entry procedures* (e.g. the intensity of competition in tender procedures); and on (3) *sanctioning practices* (e.g. public availability of the criteria employed in applying sanctions and the consistency of their application). These criteria should be regularly monitored and assessed about the de facto independent functioning of the REM, and the legislation should adopt new provisions on the effective enforcement mechanisms in the event of grave signs of non-independent operation. This was, the de iure and the de facto independence will be significantly enhanced and the democratic legitimacy of REM could also be more strongly justified.

The country's case studies revealed several good legislative solutions with the utmost relevance to the Serbian transposition. It is highly recommended to take into consideration the following examples from

### Croatia:

- strict rules on professional independence of the staff of the NRA;
- financial autonomy provisions: guarantees of independence;
- fixed and non-renewable mandates of the members of the governing body/Council of the NRA;
- strict and detailed rules on conflict of interest and compliance of the members of the governing body/Council of the NRA;
- strict consequences of dismissal and the prevention of a revolving-door-effect of the members of the governing body/Council of the NRA;

#### Slovenia:

- guarantees of independent functioning of the NRA: the operational heads of the NRA (including the directory) are not bound by instruction of the council or any other body in the performance of their duties as regards audiovisual media services;
- supervision by the Government does not entail any interference with the content of general or specific legal acts issued by the NRA; and from

#### Spain:

- accountability of the NRA: transparency obligations to make public all provisions, resolutions, decisions and reports issued;
- professional accountability: the obligation to conduct studies and research on competition, as well as general reports on the audiovisual media sectors;
- professional accountability: the obligation to conduct reports (impact assessments) in the process of drawing up binding rules;
- guarantees the political independence of the members of the Board of the NRA;
- fixed term and non-renewable mandate of the members of the Board of the NRA.

Furthermore, the transposition of the new provisions of the Revised AVMSD should take into account *previous evaluations about the level of independence of the Regulatory Authority for Electronic Media (REM)* which could greatly inform the next phase of the legislative process.

### Guarantees on the independence of the REM

In 2017, the Council of Europe commissioned Report about the independence of the REM of Serbia (Irion *et al.*, 2017) and carried out a full and detailed assessment based on the methodology, which was later used by the European Commission to formulate the requirements posed by the Revised AVMSD. The Report has put forward *several policy recommendations addressed to the Serbian legislator* (ibid. p. II-V) to *ensure both the formal and the functioning independence of the REM*. The excerpts below are to reiterate the most important proposals made by the Rapporteurs:

**Table 11: Policy recommendations addressed to the Serbian legislator to ensure both the formal and the functioning independence of the REM (Source: (Irion et al., 2017))**

<p><b>Status and powers</b></p>	<p>Liaise with the other sector-specific independent regulators in Serbia and compile information about the impact from horizontal administrative rules.</p> <p>Adopt a scheme for how REM uses its sanctioning powers that would gradually escalate sanctions in order to step up deterrence.</p> <p>If financial sanctions are revised, REM is advised to adopt a by-law formulating a graduated response so that sanctions for not paying fees are announced and mounted corresponding to the law.</p> <p>If the process of approving the final plan becomes timely, schedule an external independent expert review of REM’s financial autonomy, including its fee structure, collection process and enforcement strategy.</p>
<p><b>Autonomy of decision-makers</b></p>	<p>The members of the Council should be more assertive and visible representatives of REM.</p>
<p><b>Knowledge</b></p>	<p>REM staff should be allowed and encouraged to be more assertive and visible representatives of REM.</p> <p>Take regular stock of the composite knowledge of the Council and communicate this to authorized nominators in order to enhance chances for distribution of competencies and knowledge conducive to well-functioning steering of REM.</p>
<p><b>Accountability and transparency</b></p>	<p>Make REM’s online reporting practices up-to-date and ensure the accountability of REM.</p> <p>Put more effort into REM’s outreach</p>

## Strengthening the accountability of the REM

There has been made several for the establishment of an EU- and also national-level monitoring system that evaluates the independence of the NRAs based on specific, evidence-based criteria reiterating the takeaways of previous incidents on the breaches of independence (Polyák and Rozgonyi, 2015). These considerations are highly relevant to the Serbian context; therefore, the parallel strengthening of REM’s accountability would be inevitable in enhancing the legitimacy of REM and the enforcement of European fundamental rights.

## Looking ahead

The Revised AVMSD has brought about a long-awaited policy shift towards making the independence of regulatory bodies an explicit European legal requirement, but it has also left many issues of independence from the past unresolved, and did not provide the European Commission with the necessary powers to monitor and reflect on accountability matters (Polyák, 2022). Moreover, the EU-level

coordination between national media regulators became a focal point recently for EU media policy in the digital environment (Ranaivoson, Broughton Micova and Raats, 2023b); Polyak & Kersevan, 2023). Therefore, the Serbian legislator should also consider the recently proposed legislation in the EU, the draft European Media Freedom Act (Draft EMFA)<sup>30</sup>, which has put forward specific objectives for increasing regulatory cooperation and convergence through cross-border coordination tools and EU-level opinions and guidelines. The policy objective of the Draft EMFA is to “promote consistent approaches to media pluralism and media independence, and provide effective protection for users of media services from illegal and harmful content, including online and about service providers (including from third countries) not following EU media standards”<sup>31</sup>. Section 3 of the Draft EMFA contains a set of rules and procedures for regulatory cooperation and convergence, comprising a mechanism for structured cooperation, requests for enforcement measures, guidance on media regulation matters and coordination of measures concerning third-country media services. The provisions are intended to ensure closer cooperation among national regulatory authorities and bodies in different areas of media regulation. Furthermore, the Draft EMFA proposed to establish the European Board for Media Services, the collective body of independent media regulators, replacing and succeeding the European Regulators Group for Audiovisual Media Services (ERGA).

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30 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU; COM/2022/457 final.

31 Ibid. p. 1.

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